

LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 66

MARCEL MAX LUTWAK, MUNIO KNOLL AND
REGINA TREITLER, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 16, 1952

CERTIORARI GRANTED OCTOBER 13, 1952

IN THE
Supreme Court of the United States

OCTOBER TERM, 1951.

No.

MARCEL MAX LUTWAK, MUNIO KNOLL, AND
REGINA TREITLER,

Petitioners;

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT.

INDEX.

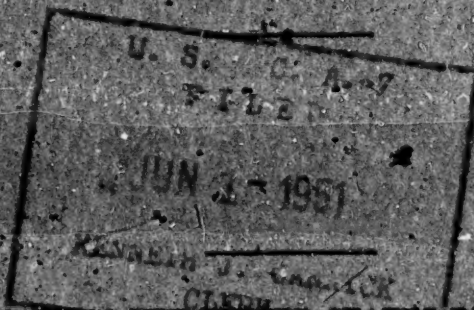
| | |
|---|-----|
| Index to printed transcript of record of proceedings in the United States District Court | i |
| Clerk's Certificate | 387 |
| Index to proceedings in U. S. Court of Appeals: | |
| Placita | 389 |
| Order taking cause under advisement, entered December 5, 1951 | 390 |
| Opinion by Lindley, C. J., filed January 3, 1952 | 391 |
| Judgment Affirming as to Marcel Max Lutwak, entered January 3, 1952 | 401 |
| Judgment Affirming as to Munio Knoll, entered January 3, 1952 | 402 |
| Judgment Affirming as to Regina Treitler, en- tered January 3, 1952 | 403 |
| Reference to filing Petition for Rehearing | 403 |
| Reference to filing Answer to Petition for Re- hearing | 403 |
| Opinion of the Court Concerning the Petition for Rehearing, filed April 16, 1952 | 404 |
| Order denying Petition for Rehearing, entered April 16, 1952 | 415 |
| Reference to Issuance of Mandates, April 22, 1952 | 415 |
| Order Recalling and Staying Mandates, entered April 23, 1952 | 416 |
| Designation of Record, filed April 29, 1952 | 417 |
| Clerk's Certificate | 421 |
| Order allowing certiorari | 422 |

In the
United States Court of Appeals
For the Seventh Circuit

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 10,326 *vs.*
MARCEL MAX LUTWAK,
Defendant-Appellant.

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 10,327 *vs.*
MUNIO KNOLL,
Defendant-Appellant.

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 10,328 *vs.*
REGINA TREITLER,
Defendant-Appellant.



APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

The Scheffer Press, Inc.—ANDOVER 3-6850

TRANSCRIPT OF RECORD FILED MARCH 2, 1951
PRINTED RECORD

In the
United States Court of Appeals
For the Seventh Circuit

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 10,326 vs.
MARCEL MAX LUTWAK,
Defendant-Appellant.

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 10,327 vs.
MUNIO KNOLL,
Defendant-Appellant.

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 10,328 vs.
REGINA TREITLER,
Defendant-Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

INDEX.

| | PAGE |
|--|--------|
| Placita | 1 |
| Statement under Rule 10(b) of U.S.C.A. | 2 |
| Indictment | 4, 14 |
| Motion to Dismiss, of Defendant Regina Treitler | 15 |
| Motion to Dismiss, of Defendants Leopold Knoll and Grace Klemtner Knoll | 16 |
| Order— | |
| October 19, 1950 that leave be granted defendants to adopt motion of Defendant Regina Treitler to dismiss certain counts | 17 |
| That Cause be set for Trial January 8, 1951 | 18 |
| November 27, 1950 that motion of Defendant Grace Klemtner Knoll to dismiss Count One is granted | 18 |
| Motions of other defendants to dismiss Counts One and Six are denied | 19 |
| January 16, 1951 certain counts dismissed for want of proper venue | 19 |
| That jury be permitted to separate | 19, 20 |
| Transcript of Proceedings | 21 |
| Opening Statement on Behalf of the Government | 22 |

WITNESSES.

On Behalf of the Government:

Anne Zapler—

| | |
|---|----|
| Direct Examination by Mr. Downing | 28 |
| Cross Examination by Mr. Sokol | 36 |
| Redirect Examination by Mr. Downing | 36 |
| Recross Examination by Mr. Sokol | 38 |
| Cross Examination by Mr. Gerber | 39 |

Maria Lutwak—

Direct Examination by Mr. Downing 40

Resumed—

Direct Examination (Continued) by Mr.
Downing 58

Cross Examination by Mr. Gerber 70

Cross Examination by Mr. Eben 78

Cross Examination by Mr. Bartoline 78

Resumed—

Cross Examination (Continued) by Mr. Bart-
oline 82

Cross Examination by Mr. Eben 88

Redirect Examination by Mr. Downing 90

Recross Examination by Mr. Bartoline 91

Joseph Ludmer—

Direct Examination by Mr. Downing 92

Cross Examination by Mr. Eben 110

Cross Examination by Mr. Bartoline 116

Cross Examination by Mr. Gerber 118

Redirect Examination by Mr. Downing 129

Jane Turner—

Direct Examination by Mr. Downing 131

Cross Examination by Mr. Eben 137

Nettie Wicker—

Direct Examination by Mr. Downing 138

Cross Examination by Mr. Bartoline 144

Redirect Examination by Mr. Downing 144

George Grothe—

Direct Examination by Mr. Downing 145

Morris Haberman—

Direct Examination by Mr. Downing 150

Resumed—

Direct Examination (Continued) by Mr.
Downing 172

Bess Osborne—

Direct Examination by Mr. Downing 190

Cross Examination by Mr. Gerber 210

| | |
|---|-----|
| Cross Examination by Mr. Eben | 216 |
| Cross Examination by Mr. Sokol | 219 |
| Redirect Examination by Mr. Downing | 220 |
| Recross Examination by Mr. Gerber | 222 |
| Recross Examination by Mr. Eben | 222 |

Ben Tunick—

| | |
|---|-----|
| Direct Examination by Mr. Downing | 269 |
| Cross Examination by Mr. Eben | 272 |
| Redirect Examination by Mr. Downing | 273 |
| Recross Examination by Mr. Eben | 273 |

COURT'S WITNESS.

Mrs. Leopold Knoll—

| | |
|--|-----|
| Examination by Court | 226 |
| Cross Examination by Mr. Downing | 226 |

Resumed—

| | |
|--|-----|
| Cross Examination (Continued) by Mr. Downing | 240 |
| Cross Examination by Mr. Eben | 258 |
| Recross Examination by Mr. Downing | 265 |
| Recross Examination by Mr. Eben | 267 |

| | |
|---|----|
| Argument re Competency of Witness | 41 |
|---|----|

| | |
|---------------------------|----|
| Address by Mr. Eben | 53 |
|---------------------------|----|

| | |
|----------------|--|
| Colloquy | 55, 80, 100, 124, 126, 148, 156, 164, 171, 184, 186, 223, 274, 287, 345, 348 |
|----------------|--|

| | |
|---|-----|
| Argument re Admission of Exhibits | 181 |
|---|-----|

| | |
|---|-----|
| Argument re Testimony of Bess Osborne | 187 |
|---|-----|

| | |
|---|-----|
| Government's Exhibits Offered in Evidence | 267 |
|---|-----|

| | |
|--------------------------------|-----|
| Argument re Instructions | 277 |
|--------------------------------|-----|

| | |
|--|-----|
| Government's Exhibits Received in Evidence | 279 |
|--|-----|

| | |
|--|-----|
| Argument re Admission of Testimony | 283 |
|--|-----|

| | |
|-----------------------------|-----|
| Motions for Acquittal | 289 |
|-----------------------------|-----|

| | |
|--|-----|
| Argument re Motions to Dismiss Certain Counts | 291 |
|--|-----|

| | |
|---|-----|
| Court's Instructions Submitted to Counsel | 293 |
| Objections to Certain Instructions | 299 |
| Discussion re Counts | 301 |
| Discussion re Instructions | 305 |
| Proceedings Resumed After Recess | 327 |
| Court's Charge to the Jury | 329 |
| Verdicts of Jury | 349 |
| Discussion re Bonds | 351 |
| Certificate of Official Court Reporter | 353 |
| Instructions Submitted and Given | 354 |
| Verdict as to Munio Knoll | 358 |
| As to Marcel Max Lutwak | 359 |
| As to Regina Treitler | 360 |
| As to Leopold Knoll | 361 |

Orders—

| | |
|--|-----|
| January 18, 1951 that alternate jurors be dismissed | 362 |
| That defendant Leopold Knoll go hence without day discharged from further prosecution under Indictment filed against him | 362 |
| That bonds of defendants Munio Knoll, and Marcel Max Lutwak be increased to the sum of Five Thousand Dollars each | 362 |
| That bond of defendant, Regina Treitler remain in full force and effect | 362 |
| Motion for New Trial | 363 |
| Motion in Arrest of Judgment | 365 |

Orders—

| | |
|---|-----|
| January 22, 1951, that motions of defendants for judgment of acquittal notwithstanding the verdict are overruled and denied | 366 |
|---|-----|

| | |
|---|-----|
| That sentence and judgment of Court upon verdicts rendered that each of defendants be committed to custody of Attorney General of the United States for period of Two Years and forfeit and pay fine of Ten Thousand Dollars each together with costs | 367 |
| Notice of Appeal of Munio Knoll | 367 |
| Of Marcel M. Lutwak | 369 |
| Of Regina Treitler | 370 |
| Certificate of Mailing | 372 |
| Statement of Points | 373 |
| Appellants' Designation of Record | 376 |
| Order— | |
| February 15, 1951 that exhibits introduced by Government be transmitted to clerk of Court of Appeals in original form | 379 |
| Appellee's Supplemental Designation of Record | 380 |
| Order— | |
| February 23, 1951 re Designation of Record and Supplemental Designation of Record | 381 |
| Clerk's Certificate | 382 |
| Notice under Rule 14 re Printing of Record | 383 |
| Plaintiff-Appellee's Supplemental Designation of Record | 386 |
| Order allowing certiorari | 422 |

UNITED STATES OF AMERICA,
Appellee,
and Cross-Appellant
vs.

MUNIO KNOLL, alias Zygmunt Ro-
mankiewicz, MARCEL MAX LUT-
WAK, REGINA TREITLER,
Appellants,
and Cross-Appellees.
and

LEOPOLD KNOLL,
Cross-Appellee.

No. 50 CR 464

1 Pleas had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of January (it being the 1st day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty-One and of the Independence of the United States of America; the 175th Year

Present:

Honorable John P. Barnes, District Judge.
Honorable Philip L. Sullivan, District Judge
Honorable Michael L. Igoe, District Judge
Honorable William J. Campbell, District Judge
Honorable Walter J. La Buy, District Judge
Honorable William H. Holly, District Judge

Roy H. Johnson, Clerk

Thomas P. O'Donovan, Esquire, Marshal

Tuesday, January 16, 1951

Court met pursuant to adjournment

Present: Honorable John P. Barnes, Trial Judge

Monday, January 22, 1951

Court met pursuant to adjournment

Present: Honorable John P. Barnes, Trial Judge

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * Caption—No. 50 CR 464 * *

STATEMENT UNDER RULE 10(b) OF THE RULES
OF THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

1. This proceeding was commenced by the return of Indictment No. 50 CR 464 by the July 1950 Grand Jury on August 7, 1950.

2. The indictment named Munio Knoll, alias Zygmunt Romankiewicz, Marcel Max Lutwak, Regina Treitler, Leopold Knoll, and Grace Klemtner Knoll as defendants. By order of court entered on November 27, 1950, defendant Grace Klemtner Knoll was dismissed from the indictment.

3. The defendants filed motions to dismiss Count I and Count VI of the indictment on October 9, 1950. Each of the defendants also entered his plea of not guilty on October 9, 1950.

4. Following the indictment and pending trial, each of the defendants was allowed to remain at liberty on a bond of \$1,000.00.

5. The trial commenced on January 8, 1951, before the Honorable John P. Barnes, Judge of the United States District Court, and continued thereafter on January 9, 10, 11, 12, 15, 16, 17, and 18.

6. At the close of the government's case the defendants moved for acquittal under Counts II, III, IV, V and VI, on the ground, among others, that the government had failed to prove proper venue. On January 16, 1951, the court entered an order dismissing Counts II, III, IV, V, and VI for want of proper venue.

3 7. The jury returned four verdicts on January 18, 1951, finding defendants Munio Knoll, alias Zygmunt Romankiewicz, Marcel Max Lutwak and Regina Treitler guilty as charged in Count I of the indictment, and finding defendant Leopold Knoll not guilty as charged in Count I of the indictment.

8. On January 23, 1951, the court denied the defendants motions for acquittal notwithstanding the verdict,

for a new trial, and in arrest of judgment, and sentenced each of the defendants Munio Knoll, alias Zygmunt Romankiewicz, Marcel Max Lutwak and Regina Treitler to two years imprisonment and a fine of \$10,000.00.

9. Each of the defendants Munio Knoll, alias Zygmunt Romankiewicz, Marcel Max Lutwak and Regina Treitler filed a notice of appeal on January 22, 1951.

10. On January 22, 1951, the trial court refused to grant bail to any of the defendants pending appeal. On emergency petition of each defendant to the United States Court of Appeals for the Seventh Circuit, bail was set for the defendants pending appeal as follows: Munio Knoll, alias Zygmunt Romankiewicz, \$7500.00; Marcel Max Lutwak, \$7500.00; and Regina Treitler, \$2500.00.

A. Bradley Eben,
Richard F. Watt
Bernard Weissbourd
Attorneys for Defendants-
Appellants

A. Bradley Eben
208 South La Salle Street
Chicago 4
Central 6-1763

Richard F. Watt
Board of Trade Building
Chicago 4
Harrison 7-2195

Bernard Weissbourd
135 South La Salle Street
Chicago 3
Financial 6-3535

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * Caption—No. 50 CR 464 * *

Be It Remembered, that on to-wit, the 7th day of August, 1950 the above-entitled action was commenced by the filing of the following Indictment, in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in words and figures following, to-wit:

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * Caption—No. 50 CR 464 * *

COUNT ONE

The July 1950 Grand Jury charges that

Munio Knoll,
alias Zygmunt Romankiewicz,
Marcel Max Lutwak,
Regina Treitler,
Leopold Knoll and
Grace Klemtner,
alias Grace Klemtner Knoll,

hereinafter referred to as the defendants, on or about July 1, 1947, and continuously thereafter up to and including the date of this indictment, in the Northern District of Illinois, Eastern Division, and at divers other places both within and without the jurisdiction of this court, did unlawfully, willfully and knowingly conspire, combine, confederate and agree together, and with each other, to commit offenses against the United States, that is to say, the offenses set forth and described in Counts Two to Six inclusive, of this indictment, which said descriptions of said offenses are incorporated herein by reference and made a part hereof as though fully set forth, and to defraud the United States of and concerning its governmental function and right of administering the immigration laws of the United States, of and concerning its governmental function and right of administering the

Immigration and Naturalization Service of the United States Department of Justice, and of and concerning its governmental function and right to have the business and affairs of the said Immigration and Naturalization Service, in the consideration, administration, investigation and disposition of matters affecting and affected by the Immigration and Naturalization Service, conducted in its behalf honestly and free from fraud, deceit, misrepresentation, concealment of a material fact, interference and obstruction.

The grand jury further charges that the said conspiracy, combination, confederation and agreement was in manner and substance as follows, to wit:

In the summer of 1947 Maria Knoll, alias Maria Irena Lutwak, and the defendants, Munio Knoll, alias Zygmunt Romankiewicz, and Leopold Knoll, were then and there aliens and not citizens of the United States and resided in Paris, France, as the defendants herein then and there well knew.

At the time of the formation of the said conspiracy and at all times subsequent thereto one Bessie Benjamin Osborne and the defendants, Grace Klemtner, alias Grace Klemtner Knoll, and Marcel Max Lutwak, were unmarried citizens of the United States who had served in the Armed Forces of the United States during the Second World War and who had theretofore been honorably discharged from such service, as the defendants herein then and there well knew.

It was further a part of the said conspiracy that the defendant, Marcel Max Lutwak, would in the summer of 1947 journey from the United States to Paris, France, and there go through the form of a marriage ceremony with Maria Knoll, alias Maria Irena Lutwak, and that thereafter in the year of 1947 the said Maria Knoll, alias Maria Irena Lutwak, would journey to the United States and would be permitted to enter the United States for permanent residence as a non-quota immigrant by the United States immigration authorities at the Port of New York upon the representation that she was the alien spouse of a United States citizen having an honorable discharge from the Armed Forces of the United States during the Second World War under the provisions of Section 232, Title 8, United States Code.

7

It was further a part of the said conspiracy that the said Bessie Benjamin Osborne would during the year 1947 journey from the United States to Paris, France, and there go through the form of a marriage ceremony with the defendant, Munio Knoll, alias Zygmunt Romankiewicz, and that thereafter in the year 1947 the defendant Munio Knoll, alias Zygmunt Romankiewicz, would journey to the United States and would be permitted to enter the United States for permanent residence as a non-quota immigrant by the United States immigration authorities at the Port of New York upon the representation that he was the alien spouse of a United States citizen having an honorable discharge from the Armed Forces of the United States during the Second World War under the provisions of Section 232, Title 8, United States Code.

It was further a part of the said conspiracy that the defendant, Grace Klemtner, alias Grace Klemtner Knoll, would during the year 1947 journey from the United States to Paris, France, and there go through the form of a marriage ceremony with the defendant Leopold Knoll, and that thereafter in the year 1947 the defendant, Leopold Knoll, would journey to the United States and would be permitted to enter the United States for permanent residence as a non-quota immigrant by the United States immigration authorities at the Port of New York upon the representation that he was the alien spouse of a United States citizen having an honorable discharge from the Armed Forces of the United States during the Second World War under the provisions of Section 232, Title 8, United States Code.

It was further a part of the said conspiracy that the said marriages would be marriages in form only and would be entered into by the parties thereto solely for the purpose of representing them as marriages to the United States Immigration and Naturalization Service, and that the said defendants would agree that after the aforesaid ostensible marriages had been performed in Paris, France, and after the aforesaid ostensible marriages

8

had served their purpose to secure the entry of the said Maria Knoll, alias Maria Irena Lutwak, and the defendants, Munio Knoll, alias Zygmunt Romankiewicz, and Leopold Knoll, into the United States for permanent

residence as non-quota immigrants under Section 232, Title 8, United States Code, the parties to the aforesaid ostensible marriages would not live together in the United States as man and wife and thereafter would take such legal steps to sever the formal bonds of said ostensible marriages as they saw fit.

It was further a part of said conspiracy that the said defendants would at all times subsequent to the formation of the said conspiracy conceal such transactions and acts aforesaid and would do such other, further and different acts as they might deem necessary and expedient to prevent the disclosure to the United States Immigration and Naturalization Service of the existence of said conspiracy.

The grand jury further charges that the said defendants, in furtherance of and for the purpose of carrying into execution the said conspiracy, combination, confederation and agreement, did and performed the following overt acts, to wit:

OVERT ACTS.

1. On or about the first day of August, 1947, the defendant, Marcel Max Lutwak, left Chicago, Illinois, in the Northern District of Illinois, Eastern Division, for Paris, France.
2. On or about August 21, 1947, the defendant, Marcel Max Lutwak, and Maria Knoll, alias Maria Irena Lutwak, were ostensibly married in Paris, France.
3. On or about September 9, 1947, the defendant, Marcel Max Lutwak, entered into the United States at New York, New York, as the ostensible husband of Maria Knoll, alias Maria Irena Lutwak.
4. On or about and during the late summer of 1947 at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, the defendant, Regina Treitler, had a conversation with Anne Zapler.
5. On or about and during the late summer of 1947 at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, the defendant, Regina Treitler, had a conversation with Bessie Benjamin Osborne.
6. On or about and during the early fall of 1947 at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, the defendant, Marcel Max Lutwak, had a conversation with Bessie Benjamin Osborne.

7. On or about October 24, 1947, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, the defendant, Regina Treitler, and the said Bessie Benjamin Osborne departed for Paris, France.

8. On or about November 1, 1947, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, the defendant, Grace Klemtner, alias Grace Klemtner Knoll, departed for Paris, France.

9. On or about November 4, 1947, at Paris, France, the defendant, Munio Knoll, alias Zygmunt Romankiewicz, and the said Bessie Benjamin Osborne were ostensibly married.

10. On or about November 6, 1947, at Paris, France, the defendant, Leopold Knoll, and the defendant, Grace Klemtner, alias Grace Klemtner Knoll, were ostensibly married.

11. On or about November 13, 1947, at New York, New York, Munio Knoll, alias Zygmunt Romankiewicz, entered into the United States as the ostensible husband of the said Bessie Benjamin Osborne.

12. On or about November 14, 1947, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, the defendant, Munio Knoll, alias Zygmunt Romankiewicz, and the said Maria Knoll, alias Maria Irena Lutwak, commenced to reside in the same house at 3532 West Adams Street.

10 13. On or about November 17, 1947, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, the defendants, Marcel Max Lutwak and Munio Knoll, alias Zygmunt Romankiewicz, had a conversation with the said Bessie Benjamin Osborne.

14. On or about December 5, 1947, at New York, New York, the defendant, Leopold Knoll, entered into the United States as the ostensible husband of the defendant, Grace Klemtner, alias Grace Klemtner Knoll.

15. On or about December 6, 1947, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, the defendant, Leopold Knoll, commenced to reside at 3532 West Adams Street.

16. On or about and during the month of December, 1947, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, the defendant, Grace Klemtner, alias Grace Klemtner Knoll, and Jane Turner departed for Los Angeles, California.

17. On or about and during the month of December, 1947, at Los Angeles, California, the defendant, Grace Klemtner, alias Grace Klemtner Knoll, and Jane Turner commenced to reside together in that city.

18. On or about the last part of December, 1947, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, the defendant, Regina Treitler, had a conversation with Mrs. Louis Wickers.

19. On or about January 1, 1948, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, the defendant, Munio Knoll, alias Zygmunt Romankiewicz, and Maria Knoll, alias Maria Irena Lutwak, commenced to reside in an apartment located at 3545 West Maypole Street.

20. On or about and during the summer of 1948 at South Haven, Michigan, the defendant, Munio Knoll, alias Zygmunt Romankiewicz, and the said Maria Knoll, alias Maria Irena Lutwak, were guests of Mrs. Louis Wickers.

21. On or about March 31, 1950, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, the defendant, Marcel Max Lutwak, obtained a divorce decree in the Superior Court of Cook County from the said Maria Knoll, alias Maria Irena Lutwak, in violation of Section 88, Title 18, United States Code.

12

COUNT TWO.

The April 1950 Grand Jury further charges:

That on or about November 13, 1947, at New York, New York,

MUNIO KNOLL,

alias Zygmunt Romankiewicz,

hereinafter called the defendant, who has been found and may be found and is presently residing in Chicago, Illinois, in the Northern District of Illinois, Eastern Division, did unlawfully and knowingly obtain entry into the United States through the Office of the United States Immigration and Naturalization Service at the Port of New York by means of a false and misleading representation and by concealing material facts, that is to say, the said defendant, Munio Knoll, alias Zygmunt Romankiewicz, did obtain entry into the United States by

falsely representing to the United States Immigration and Naturalization Service at the Port of New York in an application for admission into the United States that he was married to one Bessie B. Osborne, a citizen of the United States, and by concealing and omitting to state to the Office of the United States Immigration and Naturalization Service, at the time of making said application, that he had gone through a marriage ceremony with the said Bessie B. Osborne solely for the purpose of representing himself as her husband in the said application for admission into the United States and with the intention and understanding that he and the said Bessie B. Osborne would not be, or in fact live together, as man and wife, but rather that they would take such legal steps to terminate the formal bonds of their ostensible marriage as they saw fit after the said ostensible marriage had served its purpose to secure the entry of the said defendant, Munio Knoll, alias Zygmunt Romankiewicz, into the United States as a non-quota immigrant under the provisions of Section 232, Title 8, United States Code.

The said April 1950 Grand Jury further charges that the defendants,

Marcel Max Lutwak,
Regina Treitler and
Leopold Knoll,

who have been found and may be found and are presently residing in Chicago, Illinois, in the Northern District of Illinois, Eastern Division, unlawfully and knowingly did aid, abet, counsel, induce and procure the said defendant, Munio Knoll, alias Zygmunt Romankiewicz, to obtain entry into the United States by means of a false and misleading representation and by concealing material facts as aforesaid: in violation of Section 180a, Title 8, United States Code.

14

COUNT THREE:

The April 1950 Grand Jury further charges:

That on or about December 5, 1947, at New York, New York,

LEOPOLD KNOLL,

hereinafter called the defendant, who has been found and may be found and is presently residing in Chicago, Illi-

nois, in the Northern District of Illinois, Eastern Division, did unlawfully and knowingly obtain entry into the United States through the Office of the United States Immigration and Naturalization Service at the Port of New York by means of a false and misleading representation and by concealing material facts, that is to say, the said defendant, Leopold Knoll, did obtain entry into the United States by falsely representing to the United States Immigration and Naturalization Service at the Port of New York in an application for admission into the United States that he was married to one Grace Klemtner Knoll, a citizen of the United States, and by concealing and omitting to state to the Office of the United States Immigration and Naturalization Service, at the time of making said application, that he had gone through a marriage ceremony with the said Grace Klemtner Knoll solely for the purpose of representing himself as her husband in the said application for admission into the United States and with the intention and understanding that he and the said Grace Klemtner Knoll would not be, or in fact live together, as man and wife, but rather that they would take such legal steps to terminate the formal bonds of their ostensible marriage as they saw fit after the said ostensible marriage had served its purpose to secure the entry of the said defendant, Leopold Knoll, into the United States as a non-quota immigrant under the provisions of Section 232, Title 8, United States Code. The said April 1950 Grand Jury further charges that the defendants,

Munio Knoll,
alias Zygmunt Romankiewicz,
Marcel Max Lutwak and
Regina Treitler,

who have been found and may be found and are presently residing in Chicago, Illinois, in the Northern District of Illinois, Eastern Division, unlawfully and knowingly did aid, abet, counsel, induce and procure the said defendant, Leopold Knoll, to obtain entry into the United States by means of a false and misleading representation and by concealing material facts as aforesaid: in violation of Section 180a, Title 8, United States Code.

COUNT FOUR.

The April 1950 Grand Jury further charges:

That on or about November 13, 1947, at New York, New York,

Munio Knoll,
alias Zygmunt Romankiewicz,
Marcel Max Lutwak,
Regina Treitler and
Leopold Knoll,

hereinafter referred to as the defendants and all of whom have been found and may be found and are presently residing in Chicago, Illinois, in the Northern District of Illinois, Eastern Division, did unlawfully and knowingly make and cause to be made a false statement under oath in an application required by the immigration laws of the United States and the regulations prescribed thereunder, that is to say, the said defendants did make and cause to be made under oath to the Office of the United States Immigration and Naturalization Service at the Port of New York in an application for the admission of the defendant, Munio Knoll, alias Zygmunt Romankiewicz, into the United States as a non-quota immigrant under the provisions of Section 232, Title 8, United States Code, the statement that the defendant, Munio Knoll, alias Zygmunt Romankiewicz, was then married to one Bessie B. Osborne; whereas, as the defendants then and there well knew, the defendant, Munio Knoll, alias Zygmunt Romankiewicz, was not in fact then married to the said Bessie B. Osborne: in violation of Section 220(c), Title 8, United States Code.

COUNT FIVE.

The April 1950 Grand Jury further charges:

That on or about December 5, 1947, at New York, New York,

Munio Knoll,
alias Zygmunt Romankiewicz,
Marcel Max Lutwak,
Regina Treitler and
Leopold Knoll,

hereinafter referred to as the defendants and all of whom have been found and may be found and are presently residing in Chicago, Illinois, in the Northern District of Illinois, Eastern Division, did unlawfully and knowingly make and cause to be made a false statement under oath in an application required by the immigration laws of the United States and the regulations prescribed thereunder, that is to say, the said defendants did make and cause to be made under oath to the Office of the United States Immigration and Naturalization Service at the Port of New York in an application for the admission of the defendant, Leopold Knoll, into the United States as a non-quota immigrant under the provisions of Section 232, Title 8, United States Code, the statement that the defendant, Leopold Knoll, was then married to one Grace Klemtner Knoll; whereas, as the defendants then and there well knew, the defendant, Leopold Knoll, was not in fact then married to the said Grace Klemtner Knoll: in violation of Section 220(c), Title 8, United States Code.

18 •

COUNT SIX.

The April 1950 Grand Jury further charges:

That on or about September 9, 1947, at New York, New York,

Munio Knoll,
alias Zygmunt Romankiewicz,
Marcel Max Lutwak,
Regina Treitler and
Leopold Knoll,

hereinafter referred to as the defendants and all of whom have been found and may be found and are presently residing in Chicago, Illinois, in the Northern District of Illinois, Eastern Division, did unlawfully and knowingly make and cause to be made a false statement under oath in an application required by the immigration laws of the United States and the regulations prescribed thereunder, that is to say, the said defendants did make and cause to be made under oath to the Office of the United States Immigration and Naturalization Service at the Port of New York in an application for the admission of one Maria Irene Lutwak into the United States as a

non-quota immigrant under the provisions of Section 232, Title 8, United States Code, the statement that the said Marie Irena Lutwak was then married to the defendant, Marcel Max Lutwak; whereas, as the defendants then and there well knew, the said Maria Irena Lutwak was not in fact then married to the defendant, Marcel Max Lutwak: in violation of Section 220(c), Title 8, United States Code.

A True Bill:

Agnes M. Kennedy
Deputy Foreman.

Otto Kerner, Jr.
United States Attorney

No. 50 CR 464

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

The United States of America

v.

Munio Knoll, alias Zygmunt Romankiewicz, Marcel Max
Lutwak, Regina Treitler, Leopold Knoll and Grace
Klemtner, alias Grace Klemtner Knoll

INDICTMENT.

VIO: Sections 88 and 550, T. 16, U.S.C.:

Sections 180a and 220(c), T. 6, U.S.C.

(Conspiracy to obtain the entry of aliens into the United States by means of false statements and by concealing material facts and to defraud the United States of a governmental function; obtaining entry into the United States as alien immigrant by means of false statements and by concealing material facts, and aiding and abetting so to do; and making false statements under oath in applications required by the immigration laws of the United States)

A true bill, Agnes M. Kennedy, Foreman

Filed in open court this 7th day of August,

A. D. 1950.

Ray H. Johnson, Clerk.

20 And afterwards on, to wit, the 8th day of September, 1950 came the Defendant, Regina Treitler by her attorneys and filed in the Clerk's office of said Court her certain Motion To Dismiss in words and figures following, to wit:

21
IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * Caption—No. 50 CR 464 * *

MOTION TO DISMISS OF 'REGINA' TREITLER

Now Comes Regina Treitler, defendant herein, by Bernard H. Sokol, her attorney, and moves to dismiss Counts One and Six of the indictment, pursuant to Rule 12, b 3, Federal Rules of Criminal Procedure, and states:—

1. Defendant has been previously indicted in a case pending before this court, No. 50 Cr 276, and the instant indictment is in the same language, intended, as has been announced by the United States Attorney, to replace the indictment in No. 50 Cr 276.

2. Several motions to dismiss have been filed against the indictment No. 50 Cr 276, all of which are pending at the present time, awaiting a reply on the part of the United States.

3. Regarding the instant indictment, No. 50 Cr 464, Regina Treitler now moves to dismiss Count One for the following reasons:—

22 (a) Count One charges a conspiracy to commit crimes which require concert of action and plurality of actors, and hence is indistinguishable from the crimes charged in Counts Two through Six.

(b) Count One is multifarious in that it charges a conspiracy to do an act and a conspiracy to aid and abet the same act.

(c) Count One is not sufficient in form to plead a judgment in bar in another prosecution for the same offense, since it charges a crime without end and this, in terms in conflict with the so-called substantive counts which it incorporates by direct reference.

(d) While it is recognized that a conspiracy is

Motion to Dismiss

separate from a substantial offense, it is an abuse of judicial process to charge conspiracy where the substantive offense is charged as a concerted crime.

4. Count Six does not state a crime. It charges individuals on an aiding and abetting theory as principals, but does not allege or charge a culpable principal.

23. 5. Defendant, Regina Treitler, respectfully requests that the brief heretofore filed in her behalf in support of an identical motion to dismiss in No. 50 Cr 276, stand as a brief in support of the present motion.

Regina Treitler

By: Bernard H. Sokol

Bernard H. Sokol, her attorney.

24 And afterwards on, to wit, the 9th day of October, 1950 came the Defendants, Leopold Knoll and Grace Klemtner Knoll by their attorneys and filed in the Clerk's office of said Court their certain Motion To Dismiss in words and figures following, to wit:

25

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

Caption—No 50 CR 464

MOTION TO DISMISS

The defendants, Leopold Knoll and Grace Klemtner Knoll, by and through their attorneys, A. Bradley Eben and Richard F. Watt, adopt the motion to dismiss Count One filed herein by defendant, Regina Treitler, and each and every ground stated in said motion, to the same extent as though said motion were specifically set out herein. They also adopt the brief in support of the motion to dismiss Count One filed by Regina Treitler, defendant.

As a further ground for their motion that Count One of the indictment be dismissed, in addition to the grounds stated in the motion of defendant, Regina Treitler, defendants, Leopold Knoll and Grace Klemtner Knoll, state that Count One does not allege one conspiracy, but rather three or more separate conspiracies.

The defendant, Leopold Knoll, adopts the motion to dismiss Count Six of the indictment filed herein by defend-

ant, Regina Treitler, and each and every ground stated in said motion to the same extent as though said motions were specifically set out herein. Defendant, Leopold Knoll, further adopts the brief filed by Regina Treitler in support of said motion.

Wherefore, defendants pray that their brief heretofore filed in support of the motion to dismiss Count One on the ground that Count One does not allege one conspiracy, but rather three or more separate conspiracies, be allowed to stand as their brief in support of their present motion to dismiss Count One, and defendants pray further that an order be entered dismissing Counts One and Six of the indictment.

A. Bradley Eben

Richard F. Watt

Attorneys for defendants, Leopold Knoll and Grace Klemtner Knoll.

And on the same day to wit, on the 19th day of October, 1950 being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes District Judge, appears the following entry, to wit:

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

Caption—No. 50 CR 464

This day comes the United States by the United States Attorney come also the defendants Munio Knoll alias Zygmunt Romankiewicz, Marcel Mac Lutway, Regina Treitler, Leopold Knoll, and Grace Klemtner alias Grace Klemtner Knoll in their own proper persons and by counsel and being arraigned upon the Indictment filed herein against them plead not guilty thereto and it is

Ordered that leave be and is hereby granted defendants Munzio Knoll alias Zygmunt Romankiewicz, Marcel Max Lutwak, Leopold Knoll and Grace Klemtner alias Grace Klemtner Knoll to adopt the motion of defendant Regina

Treitler to dismiss Counts One and Six of said Indictment and that leave be and is hereby granted defendants Grace Klemtner alias Grace Klemtner Knoll and Leopold Knoll to file instant a further motion to dismiss Count One of said Indictment and it is

Further Ordered that any moving party desiring to file supporting brief so do by October 19, 1950 and that answering brief be filed by November 8, 1950 and that reply brief be filed by November 15, 1950 and that hearing on said motions be and the same is hereby set for November 27, 1950 and it is

Further Ordered that this cause be and the same is hereby set for trial on January 8, 1951.

29 And afterwards, to wit, on the 27th day of November, 1950 being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

30

IN THE UNITED STATES DISTRICT COURT
For The Northern District of Illinois
Eastern Division

• • Caption—No. 50 CR 464 • •

This cause coming on for hearing on motions of the defendants to dismiss Counts One and Six of the Indictment filed herein against them comes the United States Attorney come also the defendants Munio Knoll alias Zygmunt Romankiewicz, Marcel Max Lutwak, Regina Treitler, Leopold Knoll and Grace Klemtner alias Grace Klemtner Knoll by their counsel and the Court having heard the arguments of counsel and being fully advised in the premises it is

Ordered that the motion of defendant Grace Klemtner alias Grace Klemtner Knoll to dismiss Count One of the Indictment filed herein against her be and the same is hereby granted and said Count One is accordingly dismissed and it is

Further Ordered that the motions of defendants Munio Knoll alias Zygmunt Romankiewicz, Marcel Max Lutwak,

Regina Treitler and Leopold Knoll to dismiss Counts One and Six of said Indictment be and the same are hereby denied.

31 And afterwards, to wit, on the 16th day of January, 1951, being one of the days of the regular January term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Judge John P. Barnes, District Judge, appears the following entry, to wit:

32

IN THE UNITED STATES DISTRICT COURT
For The Northern District of Illinois
Eastern Division

* * Caption—No. 50 CR 464 * *

This being the day to which this cause was continued for further trial again comes the United States by the United States Attorney come also the defendants in their own proper persons and by their counsel and the Jury and Alternate Jurors heretofore elected, empaneled and sworn herein for the trial of this cause also come and trial of this cause proceeds and the Court having heard further arguments on the defendants motions for judgment of acquittal and being fully advised in the premises it is

Ordered that Counts Two, Three Four, Five and Six of the Indictment herein be and the same are hereby dismissed for want of proper venue and it is

Further Ordered that the defendants' motions for judgment of acquittal be and the same are hereby denied as to Count One of said Indictment and the hour of adjournment having arrived it is

Ordered that the Jury and Alternate Jurors be permitted to separate until January 17, 1951 at 10:00 o'clock A.M.

33 : And afterwards, to wit, on the 17th day of January, 1951, being one of the days of the regular January term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Judge John P. Barnes, District Judge, appears the following entry, to wit:

34

IN THE UNITED STATES DISTRICT COURT
For The Northern District of Illinois
Eastern Division

* * * Caption—No. 50 CR 464 * *

This being the day to which this cause was continued for further trial again comes the United States by the United States Attorney come also the defendants in the own proper persons and by their counsel and the Jury and Alternate Jurors heretofore elected, empaneled and sworn herein for the trial of this cause also come and trial of this cause proceeds and the defendants by their counsel enter herein their motions for judgment of acquittal as to Counts Two, Three, Four, Five and Six of the Indictment filed herein against them and the Court being fully advised in the premises said motions are denied and during the hearing of final arguments the hour of adjournment having arrived it is

Ordered that the Jury and Alternate Jurors be permitted to separate until January 18, 1951 at 9:00 o'clock A.M.

45

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * * Caption—No. 50 CR 464 * *

TRANSCRIPT OF PROCEEDINGS.

had in the above-entitled cause before the Honorable John P. Barnes, one of the Judges of said Court, and a jury and two alternate jurors, in his court room in the

Transcript of Proceedings

21

United States Court House at Chicago, Illinois, commencing on Monday, January 8, 1951, at 10:00 a. m.

Appearances;

Hon. Otto Kerner, Jr.,

United States District Attorney,

(450 U. S. Court House, Chicago 4, Ill.),

represented by Robert J. Downing, Esq.,

Assistant United States Attorney,

on behalf of the United States;

John Owen, Esq.,

(30 N. La Salle st., Chicago 2, Ill.) and

Martin S. Gerber, Esq.,

(One N. La Salle st., Chicago 2, Ill.),

on behalf of defendant Munio Knoll;

46 Leo J. Bartoline, Esq.,

(231 S. La Salle st., Chicago 4, Ill.)

on behalf of defendant Marcel Max Lutwak;

Bernard M. Sokol, Esq.,

(11 S. La Salle st., Chicago 3, Ill.),

on behalf of defendant Regina Treitler;

A. Bradley Eben, Esq.,

(208 S. La Salle st., Chicago 4, Ill.),

Richard F. Watt, Esq.,

(33 N. La Salle st., Chicago 2, Ill.), and

Bernard F. Weissbourd, Esq.,

(33 N. La Salle st., Chicago 2, Ill.),

on behalf of defendant Leopold Knoll.

(During the morning session twelve jurors were duly qualified and sworn to try the issues herein; after which a recess was taken until the hour of 2:00 o'clock p. m. of the same day, January 8, 1951.)

47

Caption—No. 50 CR 464

Chicago, Illinois

January 8, 1951,

2:00 o'clock p. m.

Met pursuant to recess.

Present:

Mr. Downing

Mr. Owen

Mr. Gerber
Mr. Bartoline
Mr. Sokol
Mr. Eben
Mr. Watt
Mr. Weissbourd

And Thereupon the following further proceedings were had herein:

(Two alternate jurors were duly qualified and sworn to try the issues herein.)

Thereupon Mr. Downing addressed the Court and Jury in Opening Statement on behalf of the Government:

By Mr. Downing:

48 May it please the Court.

By the Court Mr. Downing.

By Mr. Downing: Counsel, and ladies and gentlemen of the jury:

It is my privilege to make a brief opening statement, and to generally outline what the case is about, and what we submit the Government's evidence will show in this case from witnesses who testify from this witness stand in the court room, and from exhibits which are admitted into evidence.

As I have briefly stated, this is a criminal case arising out of an indictment which has been returned by the Federal Grand Jury here in Chicago, charging these four defendants, Munio Knoll, also known as Sygmunt Romanikiewicz, Marcel M. Lutwak, Leopold Knoll and Regina Treitler with conspiring, combining and confederating together to gain the admission into the United States of three aliens, two of whom are the defendants, Munio Knoll and Leopold Knoll, and a third person by the name of Maria Irene Knoll, Lutwak, and in so conspiring, they conspired to violate the laws of the United States by obtaining entry in the United States of these aliens by making false statements and by concealing material facts,
49 and by defrauding the United States of a governmental function that is to say, in the proper exercise of its right to administer the immigration laws, and the operation of the immigration and naturalization service of the Department of Justice.

The indictment further charges that in connection with the entry of two of the aliens, false statements were made

and material omissions were made, and concealment of facts was made in connection with the admission into the United States of the defendants, Munio Knoll and Leopold Knoll.

The indictment further charges in three counts that at the time each of these three aliens, the defendants Munio Knoll, Leopold Knoll and a third person, Maria Knoll Lutwak, at the time they were entered into the United States, an application for admission into this country was made under oath, at which time false statements were made.

The Government expects to prove from the witnesses who testify here, and from the exhibits which are introduced into evidence, that the three defendants, Munio Knoll, Leopold Knoll and Regina Treitler are brothers and sisters; that the defendant Marcel Max Lutwak is their nephew.

50 The Government expects to show and submits it will prove that in December, 1932, in Poland, the defendant Munio Knoll was married to this third alien who came into the United States, Marie Irene Knoll Lutwak; that in 1942, after having lived together for ten years as man and wife, these two persons obtained, during the war, what is known as a rabbinical divorce in Budapest; that in 1942, the defendant Marcel Max Lutwak came to the United States, and thereafter joined the United States Army and was naturalized as a citizen of the United States; and that he received an honorable discharge from the United States Army; that in July of 1947, the defendant Marcel Max Lutwak went to Paris where, during the summer of 1947, the defendants Munio Knoll, Leopold Knoll and the third alien, Marie Irene Knoll Lutwak had gathered; that there the defendant Marcel Max Lutwak, in Paris, met his relatives, and thereafter, on August 21, 1947, the defendants Marcel Max Lutwak and Marie Irene Knoll Lutwak entered into a marriage ceremony in Paris, France, that on September 9, 1947, the defendant Marcel Max Lutwak and Marie Irene Knoll Lutwak entered into a marriage ceremony in Paris, France, that on September 9, 1947, the defendant Marcel Max Lutwak and Marie Irene Knoll Lutwak entered into a marriage ceremony in Paris, France; that on September 9, 1947 the defendant Marcel Max Lutwak brought to the United

51 States Maria Irene Knoll Lutwak, and that she was admitted into the United States at the port of entry in New York as a so-called war bride, based upon the fact that Marcel Lutwak had been honorably discharged as a service man from the United States Army.

The government then, we submit, will show that during the months of September and October, 1947, here in the city of Chicago, the defendants Marcel Max Lutwak and Regina Treitler sought for and obtained other persons, girls, to go to Paris, France, for the express purpose of marrying Regina Treitler's brothers, the other two defendants; Munio Knoll and Leopold Knoll, who, at that time, were in Europe; that in October, 1947, one Bess Osborne, a United States Citizen, who had been in the United States Navy and had an honorable discharge certificate from the United States Navy, was secured, and on October 25, 1947, left with the defendant Regina Treitler, at Chicago, and proceeded by airplane to Paris,

52 France; that in Paris, France, she met the defendant Munio Knoll, and the defendant Leopold; that on November 1, 1947, another person by the name of Grace Klemtnér, a citizen of the United States, who had been in the service of the United States Army as a WAC, and had received an honorable discharge certificate from the United States Army; on November 1st, she proceeded by way of airplane travel to Paris, France, where she was met by the defendant, Regina Treitler, and there she met the defendants Munio Knoll and Leopold Knoll.

The Government then expects that the evidence will show and prove that on November 3, 1947, the defendant Munio Knoll and the first person Bess Osborne entered into a marriage ceremony in Paris, France, and that on November 6, 1947, the defendant Leopold Knoll and the second person, Grace Klemtnér, entered into a marriage ceremony in Paris, France; that thereafter, on November 12, the defendant, Munio Knoll along and accompanied with Bess Osborne left Paris by airplane and proceeded to New York, where they arrived on November 13th; that the defendant, Munio Knoll, was admitted into the United

53 States as a male war bride of a person honorably discharged from the United States Service, that being Bess Osborne; that they thereafter came to Chicago on the same date, November 13th.

The Government then expects to show that on December 5, 1947, the defendant Leopold Knoll and Grace Klemtner came to the United States from Paris; that the defendant, Leopold Knoll, was admitted to the United States as a male war bride because of the fact that Grace Klemtner had an honorable discharge certificate and had served in the United States Army.

We submit that the Government will show that the defendant, Leopold Knoll, came to Chicago, and that Grace Klemtner went directly to Chicago temporarily and then to Los Angeles, California, where she has resided since that time.

We submit that the evidence will show that neither the defendant Marcel M. Lutwak and Marie Irene Knoll Lutwak have ever lived together as man and wife.

We submit further that the evidence will show that the defendant, Manio Knoll, and Bess Osborne, after they arrived in Chicago, have not and up to this date, 54 have never lived together as man and wife, and we submit that the evidence will show that approximately one year ago, March, 1950, the defendant, Marcel Lutwak, obtained a divorce from Marie Irene Knoll Lutwak.

We submit that all these marriages, and we believe the evidence will show, were for the express purpose of bringing into the United States aliens under the so-called War Bride Act, and that there was never any intention of living together, and that the facts proved that they have never lived together as man and wife.

I ask you ladies and gentlemen, as this testimony is produced here in the court room, to listen only to the testimony from the witnesses who testify here on the witness stand, and pay attention to the exhibits which, when they are admitted into evidence with the court's permission, will be read to you.

Thank you.

55 Thereupon Mr. Eben Addressed The Court And Jury in Opening Statement On Behalf Of The Defendants.

By Mr. Eben: May it please the Court, Counsel for the Government, Ladies and Gentlemen of the Jury:

Rather than take up your time with a long involved statement as to what the defense will be here, a statement

which perforce should necessarily be made by all of the counsel representing the four defendants, I have been elected, so to speak, to make the statement on behalf of all defendants here. In that way I think we will proceed much more rapidly and expeditiously.

The one thing that the jury should know at the outset of the case is what the charges are upon which the defendants in this case, and there are four of them, as you know now, are brought before this court and this jury.

The representative of the Government, Mr. Downing, who appears here as an Assistant United States Attorney, has told you briefly what the indictment is about, and at the risk of being somewhat repetitious I again am going to tell you what the charges are in the indictment, 56 because it is most important and most imperative that at this stage of the proceedings you know why these four people are here.

The indictment, as his Honor Judge Barnes informed you, is merely a charge. It is not evidence of anything. This particular indictment in this case is in what we call six counts.

The first count is a conspiracy count. By that count the Government, or at least the grand jury here in this district, has merely laid a charge against these defendants, that they conspired to violate certain laws of the United States.

Of course, at the proper time during the course of the case his Honor Judge Barnes will instruct you as to what are the elements of a conspiracy, and presumably you will follow those instructions.

This count says that the four defendants here agreed to enter into a conspiracy by virtue of which the United States Government, in the form of the Immigration and Naturalization Service, was deprived of its right to carry out their activities in complete honesty and without 57 fraud and deceit. In other words, they are saying these people conspired to conceal some particular act, some particular statement, some particular activity from the Immigration and Naturalization Service, and that the Immigration and Naturalization Service had a right to know about the particular act in question.

At the same time they also say in the count that these four people conspired to make some affirmative misstate-

ment, and I want you to note that now also, that the charges in the indictment are really twofold. There are two sides to the coin.

On one side they say the defendants concealed something they should have said, and in the other place they say they said something falsely when they did say it.

As I say, that is the conspiracy count.

The Government of course must prove these people did enter into an agreement to do this, and that they did some act to carry it out.

There are four other counts in this indictment, which are known technically as the substantive counts. They charge, Ladies and Gentlemen, directly that these defendants did make the false representation that I discussed before, and did conceal the material facts that I also 58 mentioned to you before. They are separate and apart, and I would like to make that very clear to you, they are completely separate and apart from the conspiracy part of the indictment which of course merely has to do with the agreement and carrying out of an act.

Without boring you and going into detail in connection with these charges I would like to tell you that each and every one of these defendants has filed his or her plea of not guilty in this case, and by that plea they say to you ladies and gentlemen of the jury that they are not guilty of each and every one of the essential allegations which are contained in this indictment and, as Judge Barnes has already told you, they are presumed to be innocent and that presumption lasts until evidence is adduced from the witnesses which theoretically or materially will overcome it.

I again say to you, please keep an open mind as the evidence develops here. The defense does not have an opportunity to put on its evidence until all of the Government's testimony is in, and only then may we proceed.

So I beg you, in doing justice to not only my client, 59 but the other defendants who sit here, to keep your minds open until you hear all of the evidence in the case.

Thank you.

60 Thereupon The Government Introduced The Following Evidence:

By The Court: Call your first witness:

Transcript of Proceedings

ANNE ZAPLER, called as a witness herein on behalf of the Government, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Downing.

Q. State your name, please.

A. Anne Zapler.

Q. What is your address, Mrs. Zapler?

A. 907 North Fourteenth street, Phoenix, Arizona.

Q. And at the present time what is your business or occupation?

A. I am a housewife.

By The Court: How do you spell your name?

The Witness: A-n-n-e Z-a-p-l-e-r.

By Mr. Downing:

Q. Did you previously reside in Chicago before residing in Ariona?

A. Yes, sir.

Q. Where did you reside in Chicago?

A. At 3543 West Madison street.

Q. And what was the date you last resided in Chicago?

A. We left Chicago on August 28, 1948.

Q. 1948?

A. No, 1949.

Q. While you were in Chicago did you operate, you and your husband, operate a business here?

A. Yes.

Q. What was the name of the business you operated?

A. Garfield Park Food Shop.

Q. Where was that located?

A. 3553 West Madison street.

Q. And from and until what date did you operate that business?

A. From the year 1939 through 1948.

Q. Are you acquainted with the defendant Marcel Max Lutwak?

A. Yes.

Q. Are you acquainted with Regina Treitler?

A. Yes, sir.

Q. Do you see them in the court room, please?

A. I see Mrs. Treitler there, and I see Marcel.

By Mr. Downing: Let the record show you have
62 pointed them out in the court room.

By the Witness: Mrs. Treitler and Marcel.
By Mr. Downing:

Q. How long have you known the defendant Regina Treitler?

A. Approximately from about 1942.

Q. Since how long, or since what date, approximately, have you known the defendant Marcel Lutwak?

A. Approximately the same time also.

Q. Directing your attention to the defendant Regina Treitler, did you ever have any conversation with her regarding her brother or brothers in Europe?

A. Yes, sir.

Q. As best you can recall, when was that conversation?

A. In the late summer I spoke with Mrs. Treitler, in the late summer of 1947.

Q. Where was this conversation at?

A. In our store.

Q. And do you recall who was present at that time?

A. Well, the first time, as I recall, there were customers present.

Q. And you don't recall at this time the names of any of those customers?

63 A. No, sir, I do not.

Q. What was said at that time by Mrs. Treitler and what did you say, at that particular time, as best you can recall?

By Mr. Eben: I object.

By Mr. Gerber: Objection.

By the Court: As far as I can see, what may have been said, if anything, would only be admissible as against Mrs. Regina Treitler.

By Mr. Downing: However, the conspiracy, naturally, is pleaded there in the indictment, and if it is proved we submit the acts and declarations during the course of the conspiracy are equally admissible against others.

By the Court: If made pursuant to the conspiracy and in furtherance thereof.

By Mr. Downing: That is right, your Honor, and we submit that in so far as the time and

By the Court: I have stated that what may have been said will be admissible against the defendant Treitler, Q

and it will be received—as I am presently advised, it will be limited to Mrs. Treitler. If the facts hereafter warrant its receipt and consideration against the other 64 defendants, call my attention to the fact and I will advise the jury.

By Mr. Downing: All right.

By the Court: It is now received as against the defendant Regina Treitler.

By Mr. Downing: Thank you, sir.

By Mr. Downing:

Q. Will you relate, as best you can recall at this time, what Mrs. Treitler said and what, if anything, you said at that particular time and place?

A. To the best of my recollection, all that was said was, I was asked if I knew of any girls who could go to Europe and marry her brother and bring him here to the States.

Q. Do you recall what, if anything, you said at that time?

A. No, I don't.

Q. Thereafter, did you have occasion to discuss with the defendant Regina Treitler this same matter, that you have just previously referred to?

A. Yes, sir.

Q. And where did you have this conversation?

A. In our store.

Q. And approximately how long after the first 65 conversation was this second conversation?

A. I don't recall exactly, but it must have been a couple of weeks later.

Q. And, as best you can recall, who was present at that time and place?

A. Nobody.

Q. Will you relate to the Court and jury what was said by the defendant Regina Treitler and yourself at that particular time and place?

By Mr. Eben: May we have the same objection?

By Mr. Gerber: Same objection.

By the Court: Same ruling.

By Mr. Downing:

Q. Will you relate what was said?

A. To the best of my recollection, I was asked by Mrs. Treitler if I knew of any girl who could go to Europe

and bring back her brother who, I was told then, was in a concentration camp, and had been starved, and badly beaten, and naturally it was a heart-rending story. At the time I knew of no one.

Q. Was there anything else said about the matter at that time and place?

A. Not that I can recollect.

Q. Did you have any further conversation with 66 Mrs. Treitler about the matter?

A. No, sir.

Q. Directing your attention to the defendant Marcel Lutwak, if you know, where did he live in 1947?

A. Directly above us, at 3543 West Madison street.

Q. That was right above your store?

A. No, above our apartment.

Q. Did you ever have any conversation with the defendant Marcel Lutwak regarding this matter that you had discussed and about which you testified, concerning your conversation with Mrs. Treitler?

A. I probably did, but I don't recollect exactly what it might have been.

Q. You can't now recall any such conversation?

A. No, sir.

Q. That is, in substance, what was said?

A. No, sir. It was, naturally, about the same thing, but the substance—

By Mr. Gerber: I object.

By the Court: Strike it out.

By Mr. Downing:

Q. Did you have occasion to talk to him after you first talked to Mrs. Treitler about this subject-matter about which you testified that your conversation was with 67 Mrs. Treitler?

A. Pardon me, do you mean if I spoke with him about the same thing?

Q. That is right, yes.

A. I might have, but I don't remember.

Q. You don't recall at this time?

A. (No response.)

Q. Thereafter, did you ever introduce any girls to either of the defendants, Regina Treitler or Marcel Lutwak?

A. Yes.

Q. Whom did you introduce?

A. Bess Osborne.

Q. And, when, approximately, did you introduce Bess Osborne?

A. It was in the late—some time in September, the year 1947.

Q. And to whom did you introduce Bess Osborne?

A. To Marcel Lutwak.

Q. That is the defendant Marcel Lutwak and where did you introduce Bess Osborne to the defendant Marcel Lutwak?

A. In our store.

Q. Who else was present, if you recall?

68 A. No one, to my recollection.

Q. Did you have any conversation between the three of you at the time you introduced Bess Osborne to the defendant Marcel Lutwak?

A. As best as I can remember—

By Mr. Gerber: I object to the conversation, so far as my client is concerned.

By Mr. Sokol: I would like to save the same ruling of the Court.

By Mr. Eben: Also on behalf of Leopold Knoll.

By Mr. Gerber: My client was not present.

By Mr. Downing: I submit this falls in the same category. The Government submits it will be—after evidence is in, it will be admissible against other defendants. I recognize that at the present time it perhaps is limited to the defendant Marcel Lutwak.

By The Court: The conversation now offered will be received at the present time only against the defendant Marcel Lutwak.

By Mr. Downing: Your Honor, in order to expedite this, I am just wondering if, instead of all these objections, if one objection could suffice. We probably could move along a little faster. I don't know what your

69 Honor's pleasure is in that matter.

70 By The Court: In these cases there is a great lot of objection just at first, and then later there are not so many.

By Mr. Downing:

Q. Directing your attention to the matter about which you were testifying, at the time you introduced defendant Marcel Max Lutwak to Bess Osborne, did you have any

conversation between the three of you at the time you introduced Bess Osborn?

A. To the best of my knowledge, I introduced—

By Mr. Eben: May I interject, your Honor, this purports apparently to be conversation between this defendant and someone who is not a defendant in this case, namely, Bess Osborne, and it is clearly inadmissible, whether the conspiracy is proved or not proved.

By Mr. Downing: Perhaps counsel has overlooked the fact that she said she was introducing Bess Osborne—

By The Court: Three persons.

By Mr. Downing: That is right.

By Mr. Eben: Three persons.

By Mr. Downing:

71 Q. Do you recall the question?

A. Is that the same question?

Q. Yes.

A. And I did mention she was an ex-Wave.

By The Court: I can't hear you.

By Mr. Gerber: Neither can I.

By The Witness:

A. I did mention the fact—I introduced Bess and Marcel and mentioned the fact that she was an ex-Wave.

By Mr. Downing:

Q. And was there any other conversation between the three of you? That is, Marcel and Bess and yourself at that particular time.

A. No, sir.

Q. Thereafter, that is, after you introduced Bess Osborne to the defendant Marcel Lutwak, did you have any conversations concerning this matter with either the defendant Regina Treitler or the defendant Marcel Max Lutwak?

A. Not that I recall, I didn't.

Q. You have no present recollection of any further conversations with either of the defendants, Marcel Max Lutwak or Regina Treitler, about this matter?

72 A. That happened later?

Q. Yes.

A. After I knew—

Q. Yes.

A. The only thing I can relate, to the best of my knowledge, is that I knew Bess was going—

Q. No.

By Mr. Gerber: I object to this.

By The Witness: I didn't understand the question.

By Mr. Downing:

Q. Did you have any further conversation?

Strike it out.

Do you have any recollection of any further conversation with the defendant Marcel Lutwak or the defendant Regina Treitler concerning this subject matter? That is, recollection beyond what you have testified to already.

A. No, I was just going to tell you what I thought—well, then, no.

Q. About conversation.

A. No.

Q. You have no further recollection of any conversation about this matter other than what you have testified to?

A. Well, I don't know if I understand you, but I did have conversation again?

Q. Yes.

A. Yes.

Q. Approximately when was that?

A. That was also in September of 1947.

Q. And with whom did you have this conversation?

A. I had conversation with Mrs. Treitler and with Marcel, both of them.

Q. Where did you have these conversations?

A. In our store.

Q. What to your recollection did the defendant Treitler and you talk about?

By Mr. Gerber: Object to this for the same reason, on behalf of my client.

By The Court: Who was present?

By The Witness: No, sir.

By The Court: Who was present?

By The Witness: No one, your Honor?

By The Court: When you talked to Mrs. Treitler, who was present?

By The Witness: No one.

By The Court: Well, yourself?

74 By The Witness: Yes, sir.

By The Court: And Mrs. Treitler?

By The Witness: Yes, sir.

By The Court: Anybody else?

By The Witness: No, sir.

By The Court: On the present state of the record it will be received as against Regina Treitler only.

By Mr. Downing:

Q. Will you tell us the substance as best you can recall what that conversation was?

A. This was after I knew Bess was going—

Q. Yes. What was said at that time and place?

A. Well, that she would—oh, I understand.

Q. What did Regina Treitler say and what did you say, if anything?

A. To the best of my knowledge, she wanted—

By Mr. Gerber: I object, "to the best of my knowledge," if the Court please.

By The Witness: Maybe I used the wrong word. I am sorry.

By The Court: What is your best recollection?

By The Witness: My best recollection was that they wanted a girl, preferably an ex—

By Mr. Sokol: I object. She is asked for conversation.

By Mr. Bartoline: I object.

By The Court: She doesn't have to use collegiate English. All she need to use is ordinary English. Let her alone now.

By The Witness: Thank you.

By The Witness:

A. She would like a girl to go to Europe to marry her brother who, as I related before, was in a concentration camp, and then I had introduced Bess to him, and Bess had consented to go, and they were very happy about it, and we knew Bess was going over to Europe to marry Roldi, and that is about all I can think of to tell you.

By Mr. Downing:

Q. Did you ever have any conversation with either the defendant Regina Treitler or Marcel Max Lutwak regarding any terms or conditions under which the girl was to go to Europe?

A. No, sir.

By Mr. Gerber: I object, leading.

By Mr. Sokol: I want that in. Let that in. She said, "No."

By Mr. Downing:

Q. During all this time that you had talked to Mr. Lutwak and Mrs. Treitler was the defendant Marcel Lutwak

to your knowledge residing above your residence at that time?

A. Yes, sir.

By Mr. Downing: That is all. They may cross examine.

Cross Examination by Mr. Sokol.

Q. Mrs. Zapler, I am Mrs. Treitler's attorney, Mr. Sokol. Mrs. Treitler had been a regular customer of yours for some time?

A. Yes.

Q. She customarily traded in your store and you saw her frequently, is that right?

A. Yes.

Q. Any conversation you might have with her would not be something unusual? You would pass the time of day and discuss general matters frequently, isn't that right?

A. When she came in as a customer, yes, sir.

77 Q. With respect to the conversation about which you have testified, do I recall your saying that Mrs. Treitler discussed the plight of both Poldi and Munio or Zigmund with you, about their plight in Europe and their period in a concentration camp?

A. Yes, sir.

Q. So that you knew that each had suffered that?

A. At the beginning I only knew of one.

Q. But later it came to your attention that both had had that experience?

A. Yes.

By Mr. Sokol: That is all.

By The Court: Any further cross examination?

By Mr. Eben: No cross examination on behalf of my client, your Honor.

By Mr. Bartoline: No cross examination.

By Mr. Gerber: No cross examination, your Honor.

78 *Redirect Examination by Mr. Downing.*

Q. Mrs. Zapler, at the time you had these conversations about which Mr. Sokol asked you, concerning the plight of the two brothers of Regina Treitler, was that at the same time you had the conversation about which you testified on your direct examination?

A. I don't understand your question.

Q. At the time Mrs. Treitler told you about the plight of her brothers, what else did she tell you about her brothers at that particular time, or about this matter at the time?

A. As I stated before—

By Mr. Gerber: Same objection, your Honor.

By The Court: Same ruling.

By The Witness: Shall I answer?

By Mr. Downing:

Q. Yes.

By The Court: It will be admissible as against Mrs. Treitler.

A. The only thing I can remember is, as I said before, that her brother was in a concentration camp and was badly beaten, and they would like very much to have someone to go to Europe and marry him and bring him here to this country, and the main thing then was the good deed that would have been done, because the stories were heart-rendering, and the only thing I could see was a good deed and to bring somebody here like that—

By Mr. Downing:

Q. Do you recall anything else she said about the girl going to Europe?

A. Yes, they wanted someone who had been in the service, an ex-service girl.

Q. What else was said at that time?

A. Well, I know that they had said that they would pay her way, and also—

Q. Was this the defendant Regina Treitler you are referring to?

A. Yes, sir.

Q. And what else was said about that matter besides being an ex-service girl and that she would pay her way?

A. And also she would receive a fee.

Q. Pardon?

A. That she would also receive something for it.

Q. Yes?

A. But otherwise I can't recall.

80 Q. Do you recall anything else that was said about the matter, other than what you have previously testified?

A. I can't remember now.

Q. In order to refresh your recollection, did she say anything to you at that time about the parties not living together?

By Mr. Sokol: I object, leading.

A. Yes, sir.

By Mr. Eben: And it is far beyond the limits of redirect examination. I understand Mr. Sokol asked about whether or not there had been some talk about her brothers in a concentration camp, and it ended there, and now counsel is going into other matters that he might have inquired into on direct examination, but not redirect examination.

By Mr. Downing: This is part of the conversation he asked her about, and on redirect examination I think we can clarify the conversation. We have a right to ask on any matter he has touched upon in cross examination.

By Mr. Eben: But he is going beyond those matters.

By The Court: Limit your question. The objection is overruled.

81 By Mr. Downing:

Q. Now, do you recall?

A. Yes, sir. I also was told that this girl—that they would be married in Europe and at the end of the period of six months, they could be divorced and they would not have to consummate the marriage. That I recall.

Q. Do you recall anything else that was said?

A. No, sir.

By Mr. Downing: That is all.

By Mr. Eben: Just for the record, your Honor, I would like to have the last matter stricken on the basis of the objection I made before, on the ground that it is beyond the limits of the redirect examination.

By The Court: It will be denied on that ground.

Recross Examination by Mr. Sokol.

Q. Mrs. Zapler, I put to you the fact that you have just testified with respect to a question asked you by Mr. Downing, and that you are testifying as to the recollection of what Bess Osborne may have told you at some
82 time, not what Mrs. Treitler told you.

A. No, sir, I was told that at another time.

Q. What time did this conversation take place?

A. I cannot recall the exact date, but I know it was in September of 1947.

Q. Who was present at that time?

A. No one besides myself and Mrs. Treitler.

Q. Now, may I ask this question of you. Do you know what is meant by the Jewish term "red a shidach"? I am referring to the Jewish term for the benefit of the jury.

By Mr. Downing: If your Honor please, I don't know that this has any appropriateness or materiality or relevancy to these facts under examination.

By The Court: I think the examination ought to be in English.

By Mr. Sokol: Well, I am asking the witness—
Very well.

By Mr. Sokol:

Q. I put to you, Mrs. Zapler, the fact that it is customary, and that it would be no surprise to you among Jewish people for a member of a family, such as a sister, to arrange a marriage for a relative or brother, is
83 that right?

By Mr. Downing: If your Honor please—

By The Witness:

A. Not in these days, sir.

By Mr. Sokol:

Q. That is your belief, isn't that right?

By Mr. Downing: Objection, your Honor. She has answered the question.

By The Court: Sustained.

By Mr. Downing: Is there any further cross examination?

By Mr. Gerber: I would like to ask one question, your Honor.

Cross Examination by Mr. Gerber.

Q. Mrs. Zapler, do you mean to tell us that you have never heard these days of a marriage which was arranged by members of a family among Jewish people?

By Mr. Downing: Objection, your Honor.

By Mr. Gerber: I think that is very material.

By Mr. Downing: That has been discussed by Mr. Sokol. It is just repetition. Theoretically each one of
84 these attorneys can get up and ask the witness the same thing. He has a right to ask a question, certainly, but all four of this group of attorneys do not have the right to repeat and repeat the same question.

By Mr. Gerber: Your Honor, I am not repeating. I call your attention to the fact that all four attorneys have a right to examine the witness for their individual client anything they think that is material with reference to their client, and not be confined to one attorney speaking for all of us.

By The Court: We won't pursue that argument, and we are not going to drag this case out unreasonably for any such theoretical right.

By Mr. Gerber: I am only asking your Honor that I be given the right to cross-examine on matters I think material to my client.

By The Court: You may ask a question.

By Mr. Gerber: Will you read the last question?
85 (Last question read.)

By The Witness:

A. Not in these days, no, sir, I have not.

By Mr. Gerber: That is all.

By Mr. Downing: That is all.

(Witness excused.)

MARIA LUTWAK, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

By The Witness: Your Honor, may I state a few words?

By The Court: Can you talk to me?

By The Witness: Yes.

By The Court: You don't need to talk to me, Madam. All you have to do is they will put questions to you and if any improper questions are put, counsel will unquestionably object to them, and I will sustain the objection. All you have to do is tell the truth, the whole truth and nothing but the truth and nothing will happen to you.

86 *Direct Examination by Mr. Downing.*

Q. Will you state your name, please?

A. Maria Lutwak.

Q. Will you keep your voice up loud enough so that we can hear you out here, please?

What is your address?

A. 1791 Walton Avenue, New York.

By Mr. Eben: I cannot hear you.

By the Court: You must speak up so that that last gentleman can hear you.

By the Witness: Shall I repeat my address?

By the Court: No, I am just telling you to speak loud so that everybody can hear you. That will save time and save wear and tear on you.

By Mr. Downing:

Q. Your address is 1791 Walton Street?

A. 1791 Walton Avenue, New York.

Q. What is your business or occupation?

A. I am an assistant buyer in a department store in New York, Gimbel's store in New York.

Q. Have—How long have you been employed as an assistant buyer at Gimbel's in New York?

A. One year.

87 Q. Where were you born?

A. I was born in Poland.

Q. Of what country are you now a citizen?

A. Of Poland.

Q. Are you acquainted with the defendant Munio Knoll?

By Mr. Eben? Objection. I have an argument in connection with the competency of this witness. It may lead to a voir dire examination. I think it ought to be made outside of the presence of the jury.

By the Court: Step into the jury room, Ladies and Gentlemen.

(The following proceedings were had out of the presence and hearing of the jury:)

88 By Mr. Eben: I desire to point out to the Court, on the basis of counsel's opening statement, that this witness was married to Munio Knoll, who is one of the defendants here.

By the Court: Now, what did you say, Mr. Eben?

By Mr. Eben: I say, it appears from counsel's opening statement, that is, counsel for the Government's opening statement, that this particular witness was at one time married to one of the defendants in this case whose name appears as Munio Knoll. He also stated to the jury that there was some sort of a divorce; I believe he referred to it as a rabbinical divorce. We don't know exactly whether the Government is going to contend that this witness is still married to Munio Knoll or is not married to Munio Knoll. If they do so contend,

then she is obviously incompetent to testify not only against Munio Knoll, but also against his alleged co-conspirators here on trial.

If, on the other hand, he is making another contention, I believe we ought to know that at this particular time. I think the facts will show there were a number of marriages involved here, but we don't want to be put in 89 the position of having this testimony go in, and then at some later date have some other witness' testimony also go in, on the grounds that this particular witness was in fact all the time married to Munio Knoll. I think it is proper to make the objection at this particular point, and I therefore ask the Court to call upon the District Attorney to announce what his theory is with respect to these marriages.

By Mr. Downing: Your Honor, I do not think the Government at this particular time has to make a stand one way or the other. If he wants to make a motion, then let him make a motion, and we will see where we are at when he makes the motion. Merely calling upon the Government to state its theory of its case I think is premature. He wants to blow hot and cold. If we take one position, he will blow hot, and if we take another position, some other counsel will blow cold.

I submit they are trying to straddle both horns of the dilemma. They want us to make a decision for them what conclusion to draw from the facts, and I do not think the Government is called upon to make any election at this stage.

90 By the Court: I do not think that the Government can make an election to be effective. I think the facts will probably make the election if one is to be made.

By Mr. Eben: I challenge the competency of this witness, and I think we ought to have a voir dire examination on it.

By the Court: That she is married to one of the defendants?

By Mr. Eben: Yes.

By the Court: What do you say about that?

By Mr. Downing: I think the facts are these: that this person participated in a marriage ceremony in 1932; that she obtained a rabbinical divorce. According to my

information, according to the law in the country in which she obtained it, it is not recognized as a civil divorce; that thereafter there was a marriage ceremony performed with Marcel Lutwak, and thereafter Marcel Lutwak in this country obtained a divorce from the witness.

By the Court: Now, who was she married to then?

By Mr. Downing: Munio Knoll.

By Mr. Gerber: My client, Munio Knoll, otherwise known as Zigmund Romankiewicz. They were married in 1932.

By the Court: Then there was a rabbinical divorce?

By Mr. Gerber: In 1942, in Budapest, by a rabbi.

By the Court: Then she married Marcel Max Lutwak?

By Mr. Weissbourd: Yes, in 1947.

By Mr. Downing: March 21, 1947.

By the Court: Then she divorced him?

By Mr. Weissbourn: He divorced her on March 31, 1950.

By the Court: Now she is offered as a witness against—

By Mr. Gerber: Against all the defendants.

By the Court: All of the defendants, and it is objected to, that she is not competent because of what?

By Mr. Eben: Because she is married to one of the defendants, Munio Knoll. Under the Government's theory they have just announced—

By Mr. Downing: I did not announce any theory. I stated what the facts are.

92 By the Court: Well, you are objecting—

By Mr. Eben: Let me review it for your Honor.

By the Court: I have got that. I just want to get your point.

By Mr. Eben: My objection is, she is incompetent because the Government now contends in its statement before your Honor, made in the course of the last three or four questions, that she was married to Munio Knoll, one of the defendants in this case, in 1933; that thereafter, they went through a formal divorce. He says that he intends to use her, then he intends to use another wife later on. I say he cannot have his cake and eat it. Either she is married to him or she is not married to him.

By Mr. Downing: Your Honor, to carry this argument

just a step further, if the Government was forced to make a statement, regardless of what statement it made, I submit this witness—let us assume she is married presently to both of these people. I submit, your Honor, that her testimony, except for confidential communications, under the law today is properly admissible.

93 By the Court: That is my recollection of it. Are you making the objection seriously, that she is incompetent?

By Mr. Downing: It is not the law any more.

By Mr. Eben: We are prepared to argue that.

By Mr. Downing: Except for confidential communications.

By the Court: What is your last and best case?

Mr. Weissbourd: Walker *vs.* United States, Your Honor. The distinction is in cases in which she may testify for her husband and cases where she may not testify for him.

By Mr. Downing: That is not a Supreme Court decision, however. I have just sent down for some cases, too, your Honor. I have Wigmore, too.

By the Court: What is this?

By Mr. Weissbourd: This as a case in the Third Circuit to the same effect, Bruno *vs.* United States—it is the Sixth Circuit.

By the Court: Get me 290 United States, Funk *vs.* United States.

By Mr. Downing: Here it is, right here. If your Honor please, I have here Wigmore, I think is very
94 pertinent.

By the Court: Yes. Let me see that rule.

By Mr. Downing: Rule 26, I think it is.

By the Court: What is this?

By Mr. Downing: It is Wigmore at the places marked with the two white pieces of paper, and the pencil check mark in those two places.

If your Honor please, there is also a case here, United States *vs.* Mitchell, 2nd Circuit, just on the point. There is also a statute in Illinois, in the criminal code of Illinois.

By the Court: What does that say?

Mr. Downing: That says:

"In all criminal cases, a husband and wife may testify for or against each other provided that neither may tes-

tify as to any communication or admission made by either of them to the other, or as to any conversation between them during coverture, except in cases where either is charged with an offense against the person or property of the other, or in case of wife abandonment, or where the interests of their child or children are directly involved, or as to matters in which either has acted as agent of the other."

95 By the Court: Give me 28 U. S. C. 32, please.

By Mr. Weissbourd: If I may, your Honor, I would like to point out the sequence of events after the Funk case as to which rule is applicable at this time. The Funk case abolished the common law rule that the husband or wife may not testify for each other.

The Funk case does not encompass the right of the wife to testify against the husband. The courts have pointed out there is quite a difference between that rule and the prior rule. After the Funk case, the courts enacted Rule 26 of the Federal Rules of Criminal Procedure. That embodied the doctrine of the Funk case to the effect the Supreme Court could later interpret the law of the United States on questions of evidence, particularly as to evidence of competency, since all evidence questions are open to interpretation by the Supreme Court. However, this question has not been in the Supreme Court again. It has been decided, however, by four Circuits and by the District of Columbia.

96 By the Court: I have something on my mind, and then I will hear you further.

Go ahead.

By Mr. Weissbourd: It seems to me, your Honor, that the authorities are quite clear that the Federal Courts apply the common law of the United States under Rule 26 of the Federal Rules of Criminal Procedure.

Under the common law of the United States the husband is incompetent to testify against the wife, the wife is incompetent to testify against the husband.

As for testifying for each other, the Funk case has now said that they may testify for each other, but they may not testify against each other, and particularly in criminal cases.

The policy reasons why the Supreme Court in the Funk case permitted testimony on behalf of the husband or

wife are quite different than those which prevent testimony against.

The ancient rule preventing the testimony in either case was based on the identity of interests of the husband and the wife, and the rule requiring that interested parties may not testify. With that change, it does not remove the strong policy of the common law against breaking up the marriage relationship by permitting husbands and wives to testify against each other.

Since the Funk case there has been a number of decisions which discuss the Funk case and which discuss Rule 26 of the Federal Rules of Criminal Procedure.

The latest decision is the Walker case, which your Honor has read, and in which the Supreme Court has denied certiorari, allowing that decision to stand.

That was in the Second Circuit.

The Bruner case in the Sixth Circuit holds to the same effect.

By the Court: I have not read that case.

By Mr. Downing: That is 168 F. (2d) 281.

By the Court: What have you to say in your favor?

By Mr. Downing: I think, starting out with the Funk case, which liberalizes the attitude of the courts, and the Supreme Court expressly indicated it should be liberalized, and with the authority of Wigmore, who expressly indicates in his treatise that the tendency of the courts is to seek the truth; that in seeking the truth this old common law theory that husband and wife are incompetent for or against each other should be done away with. I don't think counsel really meant everything he said, because it is a well known and well established fact, and it is mentioned in the cases he cited, that there are exceptions to this rule that he says is so iron clad, like in the white slave cases, or where the crime is against the body of one of the spouses. So it is not such a hard and fast rule.

As far as denying certiorari is concerned, we know the Supreme Court has often said that does not necessarily mean they agree with what the lower court said.

The Second Circuit in the case I have handed to your Honor I think is the Mitchell case, if I am not mistaken, but anyhow it is the case in 138 F. 2d. I think very pointedly spells out the theory that both Funk v. U. S. and Wigmore indicates should be followed.

It points out also what I submit should be considered by the court in applying Rule 26 of the Federal Rules of Criminal Procedure, that in Illinois, although counsel says that that does not bother this procedure here in the Federal Court, there has been adopted in the Criminal Code in Illinois this provision which I have indicated authorizes and permits testimony of one spouse against the other spouse, except for conversations, which as Wigmore says, are confidential communications.

We do not submit those things are permitted to be testified about. I submit here that there is nothing like that to be testified about, but as to acts and facts, I submit that after the decision in the Walker case, that on page 568 thereof, the court there expressly indicates that it is not settled, but that in light of reason it is a proper type of testimony to have, and I submit that case does 100 not stand on all fours with the situation here.

In the Mitchell case Judge Clark, in the Second Circuit, pointed out in the first part of that decision, that there is a proper distinction between the privileges applicable to acts of the parties, which is proper to be testified by either spouse, or confidential communications. There is no representation here, and we are not to that point, where there has been any testimony concerning confidential communications.

Furthermore, as Wigmore points out, this privilege is not applicable where the parties have been separated for a period of years, where there has not been any home life, which is the purpose of the privilege, to protect the home life.

By the Court: Where is that?

By Mr. Downing: That is in Wigmore, 2335, Subparagraph 1, I believe. It may not be in that particular provision, but it is in Wigmore there. I can find it.

Wigmore points out that it is not the purpose of 101 this privilege to protect something that does not exist, and as counsel know, the facts do not indicate there is any home life between this witness and either one of these two defendants with whom she has gone through a marriage ceremony.

I submit, therefore, that the reason, good common sense reason, and the decisions, such as in the Mitchell case, justify this court's ruling to permit, in the seeking of truth as to the facts in this case, the testimony of this

witness whom the Government now has on the stand.
 102. By Mr. Weissbourd: Counsel fails to distinguish between incompetence and privilege against confidential communications. The question of competency is not affected by subsequent separation. Only divorce may cut that off. As to the witness here, that is the question that is in issue before the jury.

As to the other cases, your Honor, the Mitchell case, upon which counsel relies, arose in the Second Circuit and falls within the well recognized exception to that rule, that where the case is about an injury committed upon the wife, then the wife may testify as to her husband who has committed the injury. This is not new in the law in those particular cases. It was extended to cover white slavery, which is an injury to character, morality, although perhaps not a physical injury.

The Walker case was also in the Second Circuit, decided after the Mitchell case, and this distinction is so well known that the Court in the Walker case did not even mention the Mitchell case.

One other Circuit has decided the same question
 103 tion the same way, and I believe the Appellate Court for the District of Columbia, the Third Circuit, in the Paul case, decided that the wife's testimony, despite the Funk case, is not admissible against the husband or against his co-conspirators or alleged co-conspirators.

By Mr. Downing: If your Honor please, I am not so sure that this is not a crime against the person who is offered as a witness. Furthermore, there is a technical point here, just a technical point, that these people making this motion are not the proper persons to seek to claim this privilege. They are representing Leopold Knoll, who, I don't think—maybe he has been married to her, too—they are not the ones to seek this privilege. They are out of order in claiming this privilege. If the person that claims he is married to her will stand up, then the Court is properly considering it. But these people don't represent Munio Knoll or Marcel Lutwak.

By Mr. Eben: If counsel had listened to what my associate said, he would know the law is that the testimony
 of a wife is not only not admissible against the hus-
 104 band but it is not admissible against any of his co-
 conspirators or alleged co-conspirators, and there

is an abundance of cases on that. Mr. Weissbourd mentioned two of them. Therefore, since such testimony is not admissible against any such co-conspirators, we are clearly within our rights in making the objection.

By Mr. Weissbourd: It is not a privilege we are claiming.

By The Court: I cannot see the reason for the rule which would make it incompetent against co-conspirators.

By Mr. Eben: By permitting her to testify against co-conspirators, she would in effect be testifying against her husband, establishing some part of the conspiracy in which her husband is allegedly involved. That would be the basis for the rule.

By Mr. Downing: May I make the objection that there is now going on a proceeding called United States vs. one Remington. I don't know his first name. Although there has been a divorce recently, his wife has testified. That is in the Second Circuit, where counsel says the rule 105 is so ironclad, that she cannot testify, and she has recently testified against her husband, although there has been a divorce.

By Mr. Eben: Certainly. The distinction is that there has been a divorce, and the only matters concerning which a divorced wife is barred from testifying against her former husband are those matters which are privileged. But where there is still a marriage, she is competent to testify as to anything, including matters during courtship or before that.

By Mr. Downing: Are they saying that this witness is still married to the defendant Munio Knoll?

By The Court: That is what they say.

By Mr. Weissbourd: That is what the Government says.

By Mr. Downing: No, no, no. You are the one that is making the motion.

By Mr. Eben: We have asked for a voir dire with respect to it. We would like to find out.

By Mr. Downing: I submit further, your Honor, that this testimony is not about any confidential communications. It is merely a seeking of facts, as to facts that took place, all of which are matters of public record, and there is no sanctity of the home here to protect either.

By Mr. Gerber. May I be permitted, for the purpose of the record, in order to preserve the rights of my client, to make a statement at this time?

By the Court: Yes.

By Mr. Gerber: My statement is this: I am not a party to the objection now being made. That is, my client is not a party to the objection being made. But because of certain clarity in the record, that will be necessary for me to make after this objection is over, and which I don't want to interrupt the record for at this time, I think the objection that is being made is addressed to two propositions: First, the proposition of law, asking for a ruling from the Court as to whether a wife may testify against her husband, assuming she is a wife and he is the husband. The second portion of the objection being made, after the Court rules, and if he should rule that a wife as such cannot testify against the husband, then the Court will be asked, I presume, to hear evidence as to whether or not the situation here comes within the purview of that ruling.

At that time I would like to make a statement for the record on behalf of my client.

By Mr. Downing: That statement is something like, "We want to have the benefit of this ruling if you rule in favor of us, but we don't want to make the motion."

By Mr. Gerber: No. I think it is perfectly proper for counsel to ask a ruling as to whether or not as a general proposition of law a wife may testify against a husband in a criminal case. It understand counsel is making an objection, and I do not join in it, and they ask for the Court to rule on that proposition of law, and then they will proceed further to inquire as to whether that law applies here to the facts. I am not taking any position until the factual set-up is gone into. I am not taking any position.

By Mr. Downing: Then the record shows, your Honor, so far, neither one of the defendants who have been married to this person is claiming that she is their wife, and they are claiming the privilege. Here are some people concerned with other defendants that are claiming the privilege.

108 By Mr. Gerber: Your Honor is concerned with a proposition of law, and counsel for the Government persists in inserting a question of fact. I think the proposition of law should be resolved first, before there is any necessity of going into the facts.

By the Court: Well, we do not have much time left.

Has it been established on the record that this woman was ever married to anybody?

By Mr. Downing: Not to date, not in this court room it has not been.

By the Court: I guess we had better find out about that tomorrow first.

By Mr. Downing: I further think that if the defendant— I believe regardless of what the court's decision is that it certainly is competent against persons to whom she has never been married—I think the person who says she is married to him ought to stand up and make the motion so that we will know who claims the privilege.

By Mr. Eben: I would like to read four lines from 109 this case of, U. S. v. Liddy, 2 F 2d 261, in which the court says:

“Under the common law which governs the evidence in criminal trials in federal courts the wife of one of several defendants on trial at the same time cannot be called as a witness against any of them,”

Citing three or four cases.

That rule has a very logical basis, because if a wife of one of two co-conspirators were permitted to testify not against her husband but against the co-conspirator she would still be testifying against her husband because the acts and declarations—

By the Court: You gentlemen can just make up your minds that counsel for—

By Mr. Eben: Leopold.

By the Court: Who is this woman said to have been married to?

By Mr. Downing: Munio Knoll and Marcel Max Lutwak.

By the Court: Which one was she married to first?

By Mr. Gerber: Munio Knoll, my client.

110 By the Court: If your objection is to be sustained you will make it, sir. I am addressing you, Mr. Gerber.

By Mr. Gerber: I am not seeking the sustaining of it.

By the Court: Then we are just wasting our time. If you don't make it it will never be sustained.

By Mr. Gerber: I am not a party to it.

By the Court: You gentlemen do not have any standing to make it unless counsel for Munio Knoll makes it.

By Mr. Eben: I should like to say respectfully, on the record, that I differ with your Honor's ruling.

By the Court: Save your record. If Munio Knoll does not say, "This is my wife and I don't want her to testify," she is competent. That will be the ruling.

By Mr. Gerber: So far as Munio Knoll is concerned, it is the theory of his defense that she is not his wife, and that the divorce they obtained was a legal divorce, they consider it a valid divorce. That is the theory of 111 our defense, and that is why I don't seek to take advantage of the objection.

By the Court: I am not quarreling with you.

By Mr. Gerber: I want to make my position clear so that my rights will be preserved.

By Mr. Downing: I think that resolves this question.

By the Court: I think so, too.

By Mr. Downing: May we then be permitted to continue her examination tomorrow?

By the Court: Yes.

Ask the young lady to come in.

By Mr. Bartoline: I represent Lutwak, who we contend married her in 1947. I would like to know what my position is then, because of the effect of the ruling here that she is still married to Munio Knoll, or the implication that she is—

By the Court: I am not ruling she is.

By Mr. Bartoline: All right. Thank you.

By the Court: Madam, you will return here at ten 112 o'clock tomorrow morning. In the meantime do not talk about this case with anyone.

Bring in the jury.

(Whereupon the following proceedings were had in the presence and hearing of the jury:)

By the Court: We will recess at this time, Ladies and Gentlemen, until ten o'clock tomorrow morning.

Bear in mind what I said to you about discussing this case with anyone. Do not discuss it with anyone. Do not permit anyone to discuss it with you. If anyone attempts to communicate with you about the case report that fact at once to the court.

Do not discuss the case amongst yourselves until finally it is submitted to you for decision at the end of the case.

You may go until ten o'clock tomorrow morning.

(Thereupon the further trial of the above-entitled case was adjourned until 10 o'clock a. m. of the following day, Tuesday, January 9, 1951.)

113

(Caption—No. 50 CR 464)

Chicago, Illinois
January 9, 1951,
10:00 o'clock a. m.

Met pursuant to adjournment.

Present:

Mr. Downing
Mr. Owen
Mr. Gerber
Mr. Bartoline
Mr. Sokol
Mr. Eben
Mr. Watt
Mr. Weissbourd

And thereupon the following proceedings were had here-
in out of the presence and hearing of the jury:—

By Mr. Eben: May I address the court before the jury
is brought in?

By the Court: Yes.

By Mr. Eben: May it please the Court, there came to
my attention this morning an article which appeared
114 in the Sun-Times on page 6 of this morning's edition,
and in that paper, they described somewhat what had
transpired here yesterday. Unlike the rule which governs
in the English cases wherein newspapers are permitted only
to repeat precisely what the testimony is, this newspaper
went beyond that.

There are matters which appeared in it which were not
mentioned in the evidence nor in the District Attorney's
opening statement.

Furthermore, and this is the real vice of this article,
your Honor, coupled in this article is a statement as to the
disposition which your Honor made of a case or a number
of cases yesterday.

Those cases were of the same nature as the case here.
The description of what transpired in those other cases
follows immediately after the description of what happened
here, and I will read it, very briefly. It is only three or
four paragraphs, your Honor.

After describing this particular case, the article then goes on to say:

"'A kissless bride' and two men were sentenced by Barnes—"

I presume that means Judge Barnes, of course.

115 "—in a similar case immediately before the other four went on trial.

"He ordered prison terms of a year and a day each for Thomas M. Donahue, 31, of 6547 South Minerva, a laundry truck driver, and Joseph Chiaro, 48, of 2248 Blue Island, a factory worker.

"He suspended a like sentence for Mrs. Italia Maria Buccioni Chiaro, 36, after she agreed to consent to deportation to Italy.

"The three pleaded guilty to conspiracy to break the immigration laws through the marriage-for-citizenship of Italia Maria, the sister of Donahue's war bride, and Chiaro."

I call to your Honor's attention I am not making any motion for a mistrial. We are not in a position to make any such motion because obviously it would be impossible for us to find out whether or not this jury has read this article.

We do think, however, it seriously prejudices our case, and I therefore ask your Honor, as a matter of substantial justice, to interrogate the jury this morning, as soon as 116 they come into the box, and inquire of them whether or not they have read this article, and if they have read the article, whether or not there is any prejudice that has arisen in connection with this case.

Therefore, I think your Honor should tell the jury that they ought not to read these articles; that nothing in them is evidence in this case, and they should be governed only by what they hear from the stand.

By the Court: Any other motions?

By Mr. Eben: That is all we have, your Honor.

By Mr. Gerber: That is the same motion I have. I would like to make a statement for the record aside from this motion.

By the Court: On what?

By Mr. Gerber: On another proposition.

By the Court: Anybody anything else to say about this same proposition?

By Mr. Gerber: No, but I concur in it, your Honor. I concur in the spirit of his motion.

By Mr. Eben: Mr. Bartolue points out to me in this article also it is said that, and I now quote from the article:

"Downing charged that both Miss Osborn and Miss Klemtner were paid \$1,700 by Munio Knoll, once a wealthy European distiller, to go through with the marriages."

That was not adduced here yesterday. There was no statement by Mr. Downing to that effect to the jury.

By Mr. Downing: Nor has there ever been any statement by Mr. Downing to that effect in the record.

By the Court: Now, you have all made the motions you desire to make on this matter?

By Mr. Gerber: On this matter I can only say this. I think in all fairness, no harm can certainly come to the Government's case by virtue of a ruling to keep the defendants in a cloak of innocence that they are entitled to until the evidence proves them guilty.

In that spirit, I think the jury ought to be admonished, and it should be ascertained whether they have read it, and whether it would have any effect on their deliberations.

118 By the Court: So far as I am able to observe, those of you who are sitting around this table, looking after the interests of these defendants, are not unfamiliar with the trial of criminal cases in this city. In fact, I think some of you have had vast experience.

You, I think, every one of you, know better than I do what is likely to transpire during the trial of a criminal case. Had any one of you made any request of the Court to instruct this jury not to read the newspapers yesterday, such a request would have been complied with.

I understand now the request is made. Is there a request now made to instruct the jury not to read the newspapers?

By Mr. Eben: Yes, there is.

By the Court: That request will be complied with. Your request that I interrogate the jurors will not be complied with.

The idea that people who come into a jury box leave their common sense—they check it some place down in the street, and come up in the jury box just wholly devoid of common sense, I do not think that exists any place except in the minds of the lawyers defending defendants.

119 These people are sensible people. They promised to

try this case on the evidence produced here in open court. I am sure they are going to try to do it. Had any one of you asked me to ask them not to read the newspapers, I would have done so. I am not going to interrogate them. Bring in the jury.

By Mr. Gerber: Your Honor, I have a statement before the jury is brought out.

By the Court: About what?

By Mr. Gerber: In connection with what happened yesterday afternoon. I would like to make a statement for the jury.

By the Court: All right, go ahead.

By Mr. Gerber: If your Honor please, I have been caught in quite a quandary in this case since the inception of the argument.

By the Court: What are you going to do? Do you want to object to this lady's testimony?

By Mr. Gerber: No, I am not here for that purpose, your Honor. I am here to establish the record as to my position.

By the Court: All you have to do is to sit quiet.

120 By Mr. Gerber: May I say this, your Honor?

By the Court: All you need to do is to say nothing. You do not need to talk. If you want to object on behalf of your client to the witness on the stand testifying, do so. Otherwise, all you have to do is remain quiet.

By Mr. Gerber: Your Honor, I am only trying to call your Honor's attention to the fact in this case which is destroying the ability of myself to represent my client, consistently in this case, and that is this, that the Government, by the manner in which this case is being put on, unless the record is set clear, your Honor, has prevented me from adequately preparing my defense of this case.

By the Court: Oh, I don't know.

By Mr. Gerber: I would like to explain why, if the Court please. Now, the Government is charging us with carrying water on both shoulders.

By the Court: You know how to prepare cases. Let us not waste time.

By Mr. Gerber: Your Honor, I want to be able to meet what the Government is putting in. I cannot possibly do it in the present status of this case.

By the Court: You can ask for a bill of particulars.
121 you know.

By Mr. Gerber: Your Honor, I got into this case three days before it began. Even if I had gotten into it before, your Honor, where the Government is putting a witness on the stand, your Honor, and at the same time there is going to be another woman put on the stand whom we contend is the valid wife of the defendant, I think the Government—

By the Court: The Government is not taking care of the morals of your defendants. Up to the time of this indictment, prior to that, so far as the Government was concerned, the world was before him. He could do as he pleased. What he did, he did. Bring in the jury. I do not want to waste time. You are just wasting time.

By Mr. Gerber: If your Honor understood my position, I am sure you would consider it a serious position. You haven't given me a chance to explain it to you.

By the Court: Can't you do it in a word?

By Mr. Gerber: They are about to put on a woman. They are going to put her on, on the theory she hasn't a valid divorce from my client. Then when they put on his present wife, if I object to the competency of the testimony 122 of his wife, then they are going to say—

By the Court: Oh, objection overruled.

By Mr. Gerber: Exception.

By Mr. Eben: May I have this article marked Defendants' Exhibit 1, your Honor?

By the Court: Yes.

(The document referred to was marked for identification Defendants' Exhibit 1.)

By the Court: All right, bring in the jury.

123 (The following proceedings were had in the presence and hearing of the jury:—)

By the Court: Ladies and Gentlemen, good morning.

We are engaged in an important enterprise, the trial of a case as to whether or not certain defendants have violated the laws of the United States.

That is an important thing, and it is an important function which you are to perform as jurors in this case.

I know that each and every one of you wants to do a good job. I know you want to follow the law. I know you want to be just to the Government on the one hand and to the defendants on the other.

I know that in the future time, you will look back over your life, and you will remember the fact that you were a

juror in this case, and you want to think you were a good jury man or a good jury woman.

You should listen carefully to the evidence produced 124 in open court, and listen to the judge's instructions with reference to the law, and you use the best judgment you have of the facts produced in open court, and the law as the court gives it to you. I know you will want to feel that way about it.

Now, so that you will feel that way at any time hereafter, I am going to suggest that you do not read the newspapers during the trial of this case.

If you do not read the newspapers, you won't have any difficulty in sifting out what you hear in open court from what you read elsewhere.

Just refrain from reading the newspapers. It will be worth your while. You will be glad you did. So that you will know how to decide this case on the evidence produced in open court and not on anything else, do not read the newspapers. If you have read the newspapers since we have started this case or at any time—yesterday you told me you had never heard of the case—but if yesterday, or 125 this morning, you read anything in the newspapers, get it out of your mind and forget it, and take only what is produced here in open court and in the future, I urge you and direct you not to read the newspapers until this case is over, and you will be glad if you follow that advice. Just from your own viewpoint, you will be glad, because you will want to do a good job.

The defendants are entitled to have you refrain from reading anything about this case, so just follow my direction and refrain from reading anything.

Proceed, Gentlemen.

MARIA LUTWAK, a witness heretofore called on behalf of the Government, and having been heretofore first duly sworn, resumed the stand and further testified as follows:

Direct Examination by Mr. Downing (Ctd.)

Q. What is your name, please?

A. Mrs. Maria Lutwak.

Q. You are the same witness who testified yesterday afternoon?

A. Yes, sir.

126 Q: Your first name, you are also known by the name of Mania?

A. That is just an abbreviation of the name Maria.

Q. That is spelled M-a-n-i-a?

A. That is right.

Q. You are acquainted with the defendant, Munio Knoll, and Leopold Knoll, Marcel M. Lutwak, and Regina Treitler?

A. Yes, sir.

Q. Do you see them in the court room?

A. Yes, sir.

By Mr. Downing: May we have for the record that the witness has seen and can identify the defendants in the court room?

By the Court: How is that?

By Mr. Downing: May the record show that the witness has seen and can identify the defendants in the court room?

By the Court: The record may show that she has seen the defendants and she has indicated that she does identify them.

By Mr. Downing: Thank you.

By Mr. Downing:

Q. With respect to the defendant Manio Knoll, to 127 your knowledge, has he used any other name besides that name?

● A. Yes.

● Q. What was the other name?

A. The name of Romankiewicz.

Q. What was his first name?

A. Zygmunt.

Q. When did he commence using that name, Madam?

A. During the persecution, the Nazi persecution in Hungary.

Q. What year was that that he changed the name to Zygmunt Romankiewicz as best you recall?

A. 1942, 1944.

Q. 1942?

A. First in the year 1943.

Q. The latter part of 1942 and the early part of 1943?

A. Yes.

Q. Now, have you been married?

A. Yes.

Q. When and where were you married first?

A. I was married first in 1932.

Q. What time of the year, do you recall?

A. December.

128 Q. Where were you married?

A. In Poland.

Q. To whom were you married?

A. To Munio Knoll.

Q. Have you thereafter lived with Munio Knoll as man and wife in Poland?

A. Yes.

Q. Thereafter, going on some years, were you married?

A. Yes.

Q. To whom were you married?

A. To Marcel Lutwak.

Q. That is the defendant, Marcel Lutwak, here in the court room, that you see here in the court room?

A. Yes.

Q. Where were you married to him?

A. In France.

Q. Was that in Paris, France?

A. In Paris, France.

Q. As best you recall, approximately what was the date of that marriage ceremony?

A. August, 1947.

Q. Now, was the marriage performed by civil authorities in Paris?

A. Yes.

129 Q. Who was present at the time when the marriage ceremony took place?

A. A cousin, Charlotte. I cannot recall the name.

Q. You do not recall her last name?

A. No, Charlotte and Munio Knoll.

Q. Were just those two people present with you and Marcel Lutwak at that time, that is at the time you were married?

A. Yes.

Q. Now, approximately when did you first meet Marcel Lutwak?

A. It was the end of July or the beginning of August in 1947 in Paris.

130 Q. And it was in Paris that you met him?

A. Yes.

- Q. Who introduced you to Marcel Lutwak?
- A. I guess his uncle in Paris, Bernard Wireberg.
- Q. Bernard Wireberg?
- A. And his uncle, Munio Knoll.
- Q. Munio Knoll?
- A. And Poldi, Charlotte.
- Q. By Poldi, whom do you mean?
- A. I mean Leopold Knoll.
- Q. That is the defendant Leopold Knoll here in the court room?
- A. Yes.
- Q. Your answer to that is "Yes"?
- A. Yes.
- Q. If you know, while Marcel Lutwak was in Paris, where did he live, that is, prior to the time of your marriage to him?
- A. In the Hotel le Khedive.
- Q. Where were you living at the time?
- A. In the same hotel.
- Q. If you know, prior to the marriage ceremony with Marcel Lutwak, with whom was he living at the time in the le Khedive Hotel?
- A. He was staying in the hotel, for several times—
131 for a short time he stayed with his uncle, Bernard Wireberg, and he stayed in the same hotel, in the le Khedive.
- Q. Was Bernard Wireberg staying at that hotel at that time?
- A. No, he had his own apartment.
- Q. In whose room did Marcel Lutwak stay?
- A. In the very beginning, I guess with his uncle.
- Q. Which uncle was that?
- A. Munio Knoll.
- Q. Munio Knoll. At that same time or during that same period of time, was the defendant Leopold Knoll residing at that hotel?
- A. Yes.
- Q. To your knowledge, what is the relationship between defendants Marcel Lutwak and Munio Knoll?
- A. Munio Knoll is an uncle of Marcel.
- Q. To your knowledge, what is the relationship between the defendants Munio Knoll, Leopold Knoll and Regina Treitler?
- A. They are brother and sister.

Q. With respect to the marriage ceremony with Marcel Lutwak, did you receive a wedding ring from Marcel Lutwak at that time?

132. A. Not at that time because we—

By Mr. Eben: I object to that as immaterial.

By the Court: Overruled.

By the Witness: We planned to have our wedding in the United States, a religious ceremony, where I was to receive the ring.

By Mr. Downing:

Q. Did you ever have any religious ceremony in the United States?

A. No.

Q. Did you ever receive a wedding ring from Marcel Lutwak up to this date?

A. No.

By Mr. Eben: The same objection, your Honor.

By the Court: Overruled.

By Mr. Downing:

Q. What date did you first come to the United States?

A. September 9, 1947.

Q. At what port did you enter the United States?

A. In New York.

Q. New York?

A. Yes.

Q. Did you come to the United States by boat or airplane?

A. We came by boat.

133. Q. What was the name of the boat, if you recall?

A. Queen Mary.

Q. Queen Mary?

A. Yes.

Q. With whom did you come to the United States?

A. With my husband, Marcel.

Q. Did you enter the United States as a bride of a United States service man?

A. Yes. I came with my husband.

Q. Directing your attention to a document which has been identified as Government's Exhibit 1 for identification, I ask you to look at that and state if you have ever seen that document before?

A. I see my signature on it.

Q. By your signature, are you referring to the signature above the line "Signature of alien"?

A. Yes.

Q. When was your signature placed on this document, Government's Exhibit 1 for identification?

A. On the date of entering, arriving in, the date of our arrival in New York.

Q. That was on September 9, 1947, which is the date stamped on this document, is that right?

A. Yes.

134. Q. With respect to the inked printing and writing above your signature, by whom was that placed on this document?

A. My husband Marcel. I didn't speak English yet at that time.

Q. And that was placed on there by Marcel, in your presence, is that right?

A. Yes.

Q. And where was your signature and the writing of Marcel Lutwak placed on this document, Government's Exhibit 1 for identification?

A. I didn't understand. I didn't get your question.

Q. Whereabouts did you, in what town did you place your signature and where did Marcel place his writing on this paper?

A. I guess we filled it out on the boat.

Q. On the boat, and then did you use this document at the time you came into the United States, at the port of entry, as you recall?

A. On the date and hour of arrival—

Q. Yes.

A. —we had to fill this—

Q. To fill this out?

A. To fill this application out.

135. Q. With respect to the time that you entered the United States on this date were you and Marcel questioned by an immigrant inspector in New York, that is, a person in the Immigration Department?

A. On the boat or in New York?

Q. Either after the boat docked or when you got off the boat?

A. After we got off of the boat we went to the—I went a few days later to the immigration office and they took finger prints.

By Mr. Bartoline: I can't hear the answers.

By the Court: Speak a little louder.

By the Witness:

A. A few days after our arrival in Chicago we went to the immigration office and they took finger prints of me there.

By Mr. Downing:

Q. That was at the time you registered as an alien after you had arrived in the United States?

A. I guess yes.

Q. After you signed this document which I have shown you here and it was filled out, were you then admitted into the United States there at the port in New York?

136 A. Yes. I am here.

By the Court: What did you say?

By Mr. Downing: "Yes."

By the Witness: I surely—I don't know, your Honor, if it was a consequence of filling out this particular application, but I was permitted to come into United States.

By Mr. Downing:

Q. You came into the United States after you had filled in this document, is that right, or signed this document?

A. I couldn't say strictly, it was after signing. I know we filled it out on the boat and I don't know if it was a consequence of filling out this particular paper.

By the Court: Counsel is not asking you about consequence. He is just asking about time.

If that answer is important to you you can pursue that.

By Mr. Downing:

Q. Your best recollection is that you signed this on the date that this document bears?

A. That is right.

137 Q. And that date which the document bears is the same date you arrived in the United States?

A. September 9.

Q. That was the date you entered the United States?

A. Yes.

Q. After you entered the United States at New York where did you go?

A. To Chicago.

Q. And what date did you arrive in Chicago?

A. Tenth, I imagine.

Q. Tenth of September?

A. Yes.

Q. That was the next day after you entered?

A. Yes.

Q. Where did you first reside after coming to Chicago?

A. When we arrived to Chicago I resided at Mrs. Treitler's house.

Q. If you know is that address 35 South Central Park in Chicago?

A. As far as I remember, yes.

Q. At that time did Marcel Lutwak live at Mrs. Treitler's?

A. No.

138 Q. How long did you live there at Mrs. Treitler's at that time?

A. For about five weeks.

Q. And then where did you go to live?

A. I went to Mrs. Sager's house.

Q. Is that Mrs. Rose Sager?

A. Yes.

Q. If you recall, was her address at 3532 West Adams Street in Chicago?

A. Yes.

Q. How long did you live at Mrs. Sager's house? Approximately how long?

A. Two or three weeks maybe. Mrs. Sager went for an operation to the hospital.

Q. After you left Mrs. Sager's then where did you next live?

A. I went back to Mrs. Treitler's house.

Q. And how long did you live at Mrs. Treitler's house the second time, approximately how long as best you recall?

A. About six weeks, as best I recall now.

Q. That is about as best you recall, is six weeks?

A. Yes.

Q. At that time was Marcel Lutwak living at that address, that is, at Mrs. Treitler's?

A. No.

Q. At that time, or any part of the time that you were living at Mrs. Treitler's the second time, did Munio Knoll live at Mrs. Treitler's?

A. I lived in the same house, as the middle of November—

Q. The middle of November?

A. Yes.

Q. And this is still in 1947, is it?

A. Yes.

Q. That is the year you came in?

A. Yes.

Q. And thereafter after living at Mrs. Treitler's the second time where did you go to live?

A. To an apartment on West Maypole.

Q. Is that address 3545 West Maypole, here in Chicago?

A. It is Maypole Street.

Q. How long did you live at that address?

A. For about four weeks, or five weeks.

Q. And then approximately what month was it that you left that address?

A. February.

Q. February of 1948?

140 A. Yes.

Q. At that time did Munio Knoll also live in that same address, that is, on Maypole Street?

A. Yes.

Q. And after you left that address in February of 1948 where did you go to live?

A. To New York.

By Mr. Eben: I think I will interpose an objection at this stage to all the testimony and all of the questions relative to what has transpired after her entry into this country, on the grounds that the conspiracy if any terminated at the time that she did enter the country, that there has been no showing here, like in the Rubenstein case, of any agreement beforehand, and that any acts occurring after the alleged conspiracy came to an end are immaterial in this particular case, and I direct my objections specifically to the questions just asked, and I also make a motion to ask your Honor to strike all of the testimony that this witness has given relative to what transpired after she came into the country.

141 By Mr. Downing: We plead a continuing conspiracy, and we also indicate an overt act in 1950.

Irrespective, it is still admissible, I submit, on the basis that it is testimony about the activities of these individuals during this period of time that is charged there in the indictment.

By the Court: Objection overruled.

By Mr. Bartoline: I object on behalf of Marcel Lutwak because there has been a marriage performed in France here, and I object to the competency of this witness to testify and further with reference to any further details of that marriage.

By the Court: Objection overruled.

By Mr. Downing:

Q. In February of 1948, where did you go?

A. I went to New York.

By Mr. Eben: For the purpose of the record, rather than take up the time of the court, may the record show my continuing objection to this testimony, that is, any testimony that relates to events occurring after the date 142 of entry?

By the Court: Yes. If you want to put it in—Read the next to the last paragraph.

By Mr. Eben: I do want to put it in.

By the Court: All right, you may.

By Mr. Eben: Will that also pertain to other counsel?

By Mr. Bartoline: Yes.

By Mr. Gerber: We would also like to adopt the same objections on the grounds as stated.

By the Court: Yes.

By Mr. Downing: Read the last question.

(The last question and answer were read by the reporter.)

By the Court: You object to anything after the entry, is that it?

By Mr. Eben: Yes. I will clarify my objection for your Honor.

By Mr. Downing: If your Honor please, I don't know whether all these arguments here are proper before the jury. I think—

By the Court: Oh, the jury are sensible people.

143 By Mr. Eben: We contend that the alleged conspiracy, under the Rubenstein case, came to an end at the time of the entry of any of the defendants into the country. The Rubenstein case is quite clear on it.

By the Court: On page 4 of the indictment it says:

"It is a further part of said conspiracy that the said defendants would at all times subsequent to the formation of said conspiracy conceal such transactions and acts aforesaid and would do such further and

different acts as they might deem necessary and expedient to prevent their disclosure to the United States Immigration and Naturalization Service of the existence of said conspiracy."

By Mr. Eben: I am completely aware of that, but such allegation is in complete violation of what the Supreme Court said in *Krolich v. United States*.

By the Court: No, I don't think so. Objection overruled.

By Mr. Eben: I would like to state my objection 144 for the record. That would do away with any statute of limitations. Mr. Justice Jackson specifically held—

By Mr. Downing: Of course, that was in dictum.

By the Court: Objection overruled.

By Mr. Eben: I want to put it on the record.

By Mr. Downing: What was the last question?

(The last question and answer were read by the reporter.)

By Mr. Downing:

Q. How did you go to New York from Chicago at that time?

A. By train.

Q. Do you recall who took you to the train at that time?

By Mr. Gerber: I object. It presumes somebody did take her. He is leading.

By Mr. Downing: Strike it.

By Mr. Downing:

Q. Did anyone go with you to the train at the time you went to the depot here in Chicago to go to New York?

145 A. A man by the name of Ludmer.

Q. Is that Joseph Ludmer?

A. I can't recall his first name.

Q. If you know, is he from New York?

A. I am not sure, but he was—he is a relative of the family, and—

Q. By that you mean he is a relative of Munio Knoll and Regina Treitler?

A. Yes.

Q. How long did you remain in New York approximately?

A. To June.

Q. Until June of 1948?

A. Yes.

Q. During that period of time in 1948 that you were in New York did Marcel Lutwak reside with you in New York?

A. No.

Q. And then after June of 1948 where did you go to live?

A. I went back to Chicago.

Q. And where did you then reside in Chicago?

A. I came back to Chicago for the purpose, to see my husband.

146 Q. And where did you reside in Chicago? Just answer the question.

A. Oh, on Maypole Street.

Q. That is the same address?

A. Yes.

Q. That you had resided at just prior to the time you went to New York, is that right?

A. Yes.

Q. Your answer was, "Yes," to that, was it?

A. Yes.

Q. And then how long did you reside at that address on Maypole Street, approximately how long?

A. Five months, or six, until November.

Q. Until November of 1948?

A. Yes.

Q. During that period of time did Munio Knoll reside at that same address?

A. Yes. It was his apartment.

Q. And did defendant Marcel Lutwak reside at that address during that period of time, that is, at 3545 West Maypole?

A. No, not at that time.

Q. And then where did you go to live in November of 1948?

147 A. I went back to New York.

Q. Have you lived in New York City since that time?

A. Yes.

Q. During that period of time, this last time that you have been residing in New York, has Marcel Lutwak resided with you in New York?

A. No.

Q. Since you have been here in the United States to

your knowledge has Marcel Lutwak obtained a divorce from you?

A. Yes.

Q. And about when was that, as best you recall?

A. About in April, the end of April.

Q. Was that last year, 1950?

A. Yes.

By Mr. Downing: That is all. They may cross examine.

By Mr. Bartoline: I again renew my motion, if your Honor please, to strike everything out of the record, the testimony of anything that took place, as to the competency of this witness, from August, 1947, after the marriage to my client, Marcel Lutwak, to the date of 148 the divorce in 1950.

By the Court: Motion denied.

Cross Examination by Mr. Gerber.

Q. Maria Lutwak, where were you born?

A. In Poland.

Q. How old are you, please?

A. I was born September 2, 1914.

Q. September 9?

A. 1914.

Q. 1914. Would you please keep your voice up so all the jurors and everybody can hear you?

A. Yes.

Q. Because it is hard to hear. In what town were you born in Poland?

A. Stanislawow.

Q. What is that?

A. Stanislawow.

Q. Stanislawow?

A. Yes.

Q. Did you live there all of your life up until 1942?

A. No.

149 Q. You went from there to another town in Poland?

A. Yes.

Q. What town did you go to?

A. When I was married?

Q. Yes.

A. I was living in a small—in a village or small town.

Q. Did it have a name?

A. Yes, Yashin.

Q. Was it there that you met Munio Knoll, your first husband?

A. I was married to Munio Knoll when living there.

Q. Did you meet him there for the first time?

A. No.

Q. Did you meet him in Stanislawow?

A. No, Nadvorna.

Q. Another town in Poland—

A. Yes.

Q. Where you were both living at the time that you met?

A. No.

Q. At any rate, you did go to live in this small village, the name of which you just gave us and which I cannot pronounce, is that right?

150 A. Yes.

Q. Was Munio living in that village too at the time you were married?

A. He was living—I was married to him and I went to live in the place where he was living. It was his home town.

Q. He brought you to that town, which was his home town, is that right?

A. It was his home town.

Q. You were married by a rabbi there?

A. Yes.

Q. There was no requirement, if you know, would you tell us whether or not there was a requirement in Poland of the law that you had to get married by court or civil marriage license—

By Mr. Downing: Objection.

By Mr. Gerber: This is very important.

By Mr. Downing: I object to the requirement.

By Mr. Gerber: That is what I tried to explain to the court before the jury came in. I knew I was going to run into this.

By Mr. Downing: You made your statement. Now can I make mine?

151 I don't know that this witness has been qualified to testify as to her knowledge of the law in Poland or any other country, and—

By the Court: Sustained.

By Mr. Gerber:

Q. You were married by a rabbi, you said?

A. We were married by a rabbi in my cousin's house, strictly religious ceremony, in Stanislawow.

Q. Was a marriage license taken out with the Government of Poland or with the county before a rabbi, before the wedding?

A. I don't think so, because it was in a private house, strictly religious. My father was a very religious man, and this was the most important thing to him.

Q. As far as you know, however, there was no marriage license taken out from any civil authority at the time you were married by the rabbi, is that correct?

A. Yes.

Q. As far as you know?

A. Yes.

Q. After that rabbinical marriage you proceeded 152 to live in that town with your husband until 1942?

A. No. Until 1941.

Q. 1941?

A. Yes.

Q. Did you and your husband leave that town in 1941?

A. Yes.

Q. Will you tell us the circumstances under which you left?

By Mr. Downing: Objection, your Honor. I think that is going beyond the scope of the direct examination. If they want to bring out any other evidence they can call this witness at the proper time for such direct testimony as they seek. I think it is way beyond the scope of the direct examination.

By Mr. Gerber: The District Attorney has accomplished his purpose with the witness. I think by virtue of the line of his examination I have the right to lead up and through her coming, through these routines of marriage and until she got into this country. I have a right to follow the trail that he has opened. I think it is only fair to the 153 defense that we be given the latitude to do it.

By Mr. Downing: This phase was not even covered.

By the Court: Objection sustained. You just stay within the direct, and if you want to put on any further evidence when your turn comes, and if it is competent, relevant and material, you can.

By Mr. Gerber:

Q. When you left this town in Poland in which you lived, did you leave with your husband Munio Knoll?

By Mr. Downing: Objection your Honor.

By the Court: Sustained.

By Mr. Gerber:

Q. To what place did you go after you left this town in which you were married?

By Mr. Downing: Objection, your Honor.

By the Court: Sustained.

By Mr. Gerber:

Q. Did you subsequent to that marriage obtain a divorce from your husband?

By Mr. Downing: Objection. Again, I did not go into that.

154 By Mr. Sokol: He mentioned it in his opening statement, and he is denying us the right to ask about it.

By Mr. Gerber: And on the argument that—

By Mr. Downing: We are talking about the matter of covering on cross examination what was covered on direct examination.

By the Court: Sustained. Stay within the direct.

By Mr. Sokol: In the opening statement by Mr. Downing—

By the Court: You will just stay within the direct of the witness.

By Mr. Gerber:

Q. You have stated on direct examination, Maria, that Munio Knoll changed his name to Zygmunt Romankiewicz, is that correct?

A. Yes.

Q. You did state that on direct examination. Did you state the reasons why he did it?

By Mr. Downing: Objection, your Honor.

By the Court: Sustained.

By Mr. Gerber: He asked her that question on direct.

155 By the Court: Of course he did.

By Mr. Gerber: Why can't I go into it on cross examination?

By the Court: Because he didn't go into it.

By Mr. Gerber: If your Honor please, may I make this statement—

By the Court: Well now—

By Mr. Gerber: He has brought out that the man changed his name. I want to show why, for the elucidation of the jury.

By the Court: You have emphasized it now on cross examination. Go ahead and stay within the direct.

By Mr. Gerber: Is it outside the direct to ask her the purpose for which he changed his name?

By Mr. Downing: The best witness—

By the Court: Yes. I have ruled that way.

By Mr. Gerber: All right.

By Mr. Gerber:

Q. You are now in Paris in 1947. You met Marcel Lutwak there?

156 A. After a very horrible, having a very horrible time—

By Mr. Downing: Just a minute.

157 By Mr. Gerber:

Q. Did you meet him there? Yes or no.

A. Yes.

Q. You were introduced to him by your husband, Munio Knoll, or your former husband, Munio Knoll, and other relatives, is that correct?

A. Yes.

Q. And this hotel that you were staying at in Paris, called the—what was that name?

A. Le Khedive.

Q. Did that hotel have a reputation as being a hotel where refugees coming into Paris resided?

A. Yes.

By Mr. Downing: Objection. I move to strike it out.

By the Court: Sustained. Strike it out.

By Mr. Gerber:

Q. Do you know whether this hotel is a hotel where—

By Mr. Downing: Just a minute.

By the Court: Step into the jury room, ladies and gentlemen.

(Whereupon the following proceedings were had out of the presence and hearing of the jury:)

By the Court: You may step into Chambers a moment.

158 By the Witness: Yes.

(The following proceedings were had out of the presence and hearing of the witness:)

By the Court: I will try to be patient with you. You want to show those horrible conditions that prevailed over there, and they are bad. But that is not the question in this case, and I am not going to let you try it.

By Mr. Gerber: I appreciate that.

By the Court: And so you just stay within the direct. And I am trying to be nice to you.

By Mr. Gerber: You have been.

By the Court: And I will continue to be nice to you up to a certain time.

By Mr. Gerber: May I ask your Honor a question?

By the Court: And then if you don't do as I tell you, it will cost you something.

By Mr. Gerber: It is my understanding, under the theory of the Government's case here, that these people were all living in one hotel and they are trying to make something of that. I want to show it was not unusual, they were all refugees—

By the Court: He is not trying to make something of them all living in one hotel.

159 By Mr. Gerber: He is going to. I know it is the theory of his case, and I am getting at that.

By the Court: Don't tell me. You want to prove refugees lived there, and why they had to live there, and all this and that, and you are not going into that.

By Mr. Gerber: May I be—

By the Court: Unless you make it material.

By Mr. Gerber: May I state the materiality? It is not for sympathetic reasons.

He has now shown all these relatives he said were conspiring, were living in one hotel. That is a basis for argument. I want to show it was not unusual for that—

By the Court: He showed they were present at the time she was introduced.

By Mr. Gerber: But the testimony was that Lutwak lived there—

By the Court: You do as I tell you.

Mr. Gerber: I will do as you tell me, but I want to show the facts.

By Mr. Sokol: I am doing this, your Honor, not for the record, but I want to try to sell your Honor my idea of this thing.

Where a prosecutor makes in his opening statement a positive representation of fact—

160 By the Court: Now—

By Mr. Sokol: Just a moment, sir. I will not take up your time.

By the Court: I am telling you to stay within the direct.

By Mr. Sokol: Yes.

By the Court: And you do it, sir.

By Mr. Sokol: We are.

By the Court: Bring in the jury.

(Whereupon the following proceedings were had in the presence of the jury and witness:)

By Mr. Gerber:

Q. Maria Lutwak, when you were introduced to Marcel Lutwak in Paris at this hotel, who else was present?

A. Bernard Wirzberg, Charlotte, the uncle of Marcel, his cousin, Poldi, Munio, and some friends.

Q. These were all relatives of each other, is that right?

A. Yes.

Q. Did you hear any conversation at that time, or did Marcel tell you in any conversation then or subsequent to that time anything as to his reason for coming to Paris at that time?

By Mr. Downing: I object to that. We had no conversations testified to—

By the Court: Sustained.

By Mr. Gerber:

Q. How long did you know Marcel Lutwak before the two of you were married in Paris?

A. About four weeks.

Q. Four weeks. Was there a courtship between you?

By that I mean, did you go out together or go—

A. Yes.

Q. —to entertainment places?

A. We went out a lot, and I enjoyed his company, he is intelligent, and I fell in love.

Q. Did he—

A. We fell in love.

Q. Did he tell you anything with respect to his feelings toward you before he asked you to marry him?

By Mr. Downing: I object.

By Mr. Gerber: It bears on the marriage.

By Mr. Downing: If he wants to put someone on for direct testimony, they have a proper time and a proper part of the case to put anything on that they want.

By Mr. Gerber: He has proved they were married.
612 I want to show whether or not there was a courtship
or whether there was not, or whether the usual things
took place before the marriage testified to on the Gov-
ernment's case.

By Mr. Downing: There is a proper time for their
defense.

By Mr. Gerber: He asked the question, and we have
a right to go into it.

By Mr. Downing: We had nothing to do with conver-
sations, courtship or anything, or what led up to this
ceremony, and I submit, your Honor, that is a matter of
defense. If they want to put it in, they can put it in, in
defense.

By Mr. Gerber: I have a right to cross examine the
witness as to the incidents that led up to the marriage
that he proved.

By Mr. Downing: I went not at all into the incidents
that led up to the marriage. I asked when Marcel came
there and when they were married and that was all.

By Mr. Gerber: He proved a marriage. Don't I have
the right—

By the Court: If you would just not talk so much and
let me think, it would be better.

By Mr. Gerber: All right.

163 By the Court: What is the pending question?

(Last question read by the Reporter.)

By Mr. Downing: To which there is an objection.

By the Court: She may answer.

By Mr. Gerber: The Judge says you may answer that
question.

A. I can tell you—

Q. Are you telling what he told you now? That is
what we want.

A. He told me that he loved me.

Q. He asked you to marry him, did he?

A. Not the first time.

Q. I mean, at some time during this courtship that
you had, he did ask you to marry him?

A. Later on, that is right, after the friendship and
after we got acquainted better, he asked me if I would
marry him.

Q. All right. Now, Maria, did you at any time during
your stay in Paris, and subsequent to your stay in Paris,

during your entire stay in this country, subsequent to your marriage with Marcel Lutwak, ever live together with the defendant Munio Knoll as husband and wife?

A. No, never. We were divorced.

164 By Mr. Downing: Just a minute. Just answer the questions as they are asked. I move that be stricken, your Honor.

By the Court: Strike it out.

By Mr. Gerber:

Q. After you married Marcel Lutwak, did you live with him as husband and wife?

A. Yes.

By Mr. Gerber: That is all.

By the Court: Any further cross?

By Mr. Bartoline: Yes.

By Mr. Eben: I have just one question.

Cross Examination by Mr. Eben.

Q. By that you mean, Mrs. Lutwak, that you and your husband, Marcel Lutwak, consummated your marriage?

A. I was his wife. I belonged to him.

By Mr. Eben: That is all.

Cross Examination by Mr. Bartoline.

Q. When you were living in Paris, what name did you use? What name were you known by?

By Mr. Downing: Objection, your Honor. I do not know that there is any materiality in this lawsuit
165 as to what she was known by in Paris. There has not been any allegation that this person who is a witness here was known by any other name than he has stated.

By the Court: She may answer.

By the Witness:

A. During the persecution—

By Mr. Bartoline: No.

By the Court: No, madam, just what name were you known by in Paris?

By Mr. Bartoline:

Q. What name were you known as in Paris?

A. Maria Drozd.

Q. When did you begin using that name?

A. 1942 when we escaped from the ghetto in Hungary.

By the Court: No. You answered 1942. Strike out the rest of it.

By Mr. Bartoline:

Q. When did you first begin using that name?

By Mr. Downing: Now, if your Honor please, again I say there is no materiality to that.

By the Court: Sustained.

By Mr. Bartoline:

Q. When did you arrive in Paris?

166 A. In the end of May or the beginning of June.

Q. What year?

A. 1947.

Q. When did Munio Knoll arrive there?

By Mr. Downing: If your Honor please, I want to object to this because there again it is going beyond the direct examination.

By the Court: Sustained.

By Mr. Bartoline: So that I may state my position, if the Court please, this witness stated that they were together in Paris. I want to show when they arrived there, if they arrived there together, or what the circumstances were, your Honor.

By the Court: Objection sustained.

By Mr. Bartoline:

Q. Mrs. Lutwak, did you arrive there with Munio Knoll?

By Mr. Downing: Objection, your Honor.

By the Court: Sustained.

By Mr. Bartoline:

Q. What floor of the hotel did you live on?

By Mr. Downing: Objection, your Honor, immaterial.

By the Court: Sustained.

167 By Mr. Bartoline:

Q. Did you live with Munio Knoll at the hotel?

By Mr. Downing: Objection, your Honor, immaterial.

By the Court: Sustained. Now, I have directed counsel to stay within the direct, and I direct that specifically to you, Mr. Counsel, stay within the direct. If you want to use this witness later as your witness, and she can tell you anything relevant or competent or material, you may do so.

By Mr. Gerber: Would your Honor instruct her to remain in attendance until then?

By the Court: There may be a writ issued for that purpose.

By Mr. Sokol: If the Court please, may we have a five-minute recess?

By the Court: No, we will be recessing in a few minutes. The jury has had a recess. Are there any further questions, any further cross?

By Mr. Bartoline: Yes.

By the Court: Proceed.

By Mr. Bartoline: Will you mark this Defendant Marcel Lutwak's Exhibit 1 for identification?

168. (Said document marked Marcel Lutwak's Exhibit 1 for identification.)

By Mr. Downing: May I see this before any answer is given?

By Mr. Bartoline: I would like to have it identified first.

By Mr. Downing: Before any answer is given, I would like to look at this exhibit.

By the Court: Yes. Let counsel see it.

By Mr. Bartoline:

Q. I now show you Defendant Marcel Lutwak's Exhibit No. 1 for identification, and ask you if you have seen that before.

By Mr. Downing: If your Honor please, I am going to object to this.

By the Witness:

A. Yes.

By Mr. Downing: This document here is in a foreign language. It is all in a foreign language.

By Mr. Owen: It has not been offered, if the Court please.

By Mr. Downing: I know it has not been offered. Any reference to what is in the document or anything of that nature, I think is improper.

169 By the Court: I don't know.

By Mr. Bartoline:

Q. Does this bear your signature on the first page of that document?

A. This is mine—

Q. No, answer the question, please.

A. Yes.

Q. Is this your signature on the first page here?

A. Yes.

Q. On the second page, turning the first page over, what is this inscription here at the top?

By Mr. Downing: I object, your Honor. Wait a minute. I object to what is on the document.

By the Court: Let me see it.

By Mr. Downing: This defendant is trying to get in something in an exhibit. If he wants to put a witness on, he can do it in his case.

By the Court: What do you contend this is?

By Mr. Bartoline: That shows the year—

By the Court: No, tell me what this paper is.

By Mr. Bartoline: I don't know what it is, either.

By Mr. Downing: Then I think he should not be trying to question anybody if he doesn't know what
170 it is.

By Mr. Bartoline: I know this signature there on the date it bears—

By Mr. Downing: You might as well bring up a paper out of the street and bring it here.

By the Court: If you cannot tell me any more about this than that—

By Mr. Bartoline: That is an identification paper she used in Hungary.

By the Court: Why didn't you tell me. That is what I asked you.

By Mr. Downing: Anything she used in Hungary is certainly way beyond the scope of this direct examination.

By the Court: The objection is sustained.

We will recess at this time until 2:00 o'clock, ladies and gentlemen.

(Thereupon a recess was taken to 2:00 o'clock p.m. of the same day, Tuesday, January 9, 1951.)

• • (Caption—No. 50 CR 464) • •

Chicago, Illinois,
Tuesday, January 9, 1951,
2:00 o'clock p. m.

Met pursuant to recess.

Present:

Mr. Downing

Mr. Owen

Mr. Gerber

Mr. Bartoline

Mr. Sokol

Mr. Eben

Mr. Watt

Mr. Weissbourd

And Thereupon the following further proceedings were had herein:

By the Clerk: Case on trial.

By the Court: Proceed.

MARIA LUTWAK, a witness on behalf of the Government, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination (Cont'd) by Mr. Bartoline.

172 Q. Your name is Maria Lutwak?

A. That is right.

Q. You are the same person who testified here this morning, is that correct?

A. Yes.

Q. Now, after your marriage with Marcel Lutwak, did you live with him in Paris?

A. Yes.

Q. Where did you live with him?

A. Right after we were married, we had a room in a hotel on the rue de University.

Q. What was the name of the hotel, do you remember?

A. I don't recall the name of the hotel.

Q. That was not the le Khedive Hotel?

A. No, we moved from the hotel de Khedive.

Q. How long did you live there with him?

A. I cannot recall exactly. It was for more than a week or two. I cannot exactly recall.

Q. Now, you have testified that when you came to Chicago, you went to Mrs. Treitler's house, is that correct?

A. Yes.

Q. Why did you go to Mrs. Treitler's house?

By Mr. Downing: I object, your Honor, as to 173 why.

By the Court: Sustained.

By Mr. Bartoline:

Q. Will you tell us the circumstances under which you went to live with Mrs. Treitler?

By Mr. Downing: Objection, your Honor. The fact is she testified she lived there. Now, the circumstances, I submit, are immaterial.

By the Court: Sustained.

By Mr. Bartoline:

Q. Well, did you come to Chicago—how did you come to Chicago?

A. We came by train from New York.

Q. Was Marcel with you?

A. Yes.

Q. Now, will you tell us what took place, if anything, when you arrived in Chicago?

By Mr. Downing: Objection, your Honor. That is, I submit, going beyond the direct examination. Furthermore, the question is so general that any kind of an answer could be given that might be appropriate to the question.

By the Court: What is the question? I have forgotten.

(The last question was read by the Reporter.)

174 By the Court: Well, I will sustain the objection to that.

By Mr. Bartoline:

Q. What station did you arrive at, if you know?

A. I cannot recall.

Q. Was it the LaSalle street station?

A. I cannot recall any more the station. We came by train.

Q. Who met you at the station?

A. Marcel's mother, and the family, members of the family.

Q. Will you tell us what took place at that meeting when you arrived at the station?

By Mr. Downing: Objection, your Honor. This question, too, I think, is immaterial, what took place when they arrived. The form of the question is bad, and I do not think it is material, either.

By the Court: I haven't any idea what the answer might be, and, accordingly, I cannot tell why it may be immaterial. That is not a good reason for permitting the question. Sustained.

By Mr. Bartoline:

Q. Now, calling your attention to the time you met Marcel, and prior to the marriage in August of 1947,

175 did you ever have any discussion with him about getting a divorce after you had arrived in this country?

By Mr. Downing: If your Honor please, I object to that. There wasn't any conversation—

By the Court: She may answer.

By the Witness:

A. No, never. I mean, we married because we loved each other.

By Mr. Bartoline:

Q. Did Marcel ever visit you at the home of Mrs. Treitler when you were living there?

A. Oh, yes, every day. We were practically together all the time except his going to the office.

Q. Did you live with him as husband and wife at that time?

A. Yes.

Q. Now, when you moved over to Mrs. Sager's home, did Marcel visit you there?

A. Yes, all the time.

Q. Did you live with him as husband and wife on those occasions?

A. Yes.

Q. Now, you lived there for how long at Mrs. Sager's home?

176. A. I cannot say how long.

Q. Two or three weeks, you indicated?

A. Yes, that is right, two weeks.

Q. Then you moved back to Mrs. Treitler's home, is that right?

A. Yes.

Q. Did he visit you there?

A. Yes, sir.

Q. Did you live with him as husband and wife there?

A. Yes.

Q. Then when you moved to 3545 West Maypole—

By Mr. Downing: If your Honor please, may the record show if I said 35, I should have said 3345. I think I did say 35, and I have been told that I said 35. May we have the record changed to 3345?

By the Court: Very well.

By Mr. Bartoline:

Q. When you arrived at 3345 West Maypole, did Marcel Lutwak visit you there?

A. Yes.

Q. And did you live with him as husband and wife?

A. Yes.

Q. Where were you married in Paris?

A. At the City Hall.

177 Q. At the City Hall in Paris?

A. Yes, I think they call it the City Hall.

By Mr. Bartoline: Will you mark this defendant Marcel Lutwak's Exhibit No. 2 for identification?

(Said document was marked Marcel Lutwak's Exhibit 2 for identification.)

By Mr. Downing: May I see it?

By Mr. Bartoline:

Q. I now show you exhibit marked Defendant Marcel Lutwak's Exhibit No. 2. Will you tell me if you have seen this before?

A. Yes.

Q. Can you tell us by an inspection what that instrument is?

By Mr. Downing: Just a minute. I object to this. First of all, this is all in a foreign language, and, secondly, it was not covered—it was not any part of the direct examination.

By the Court: What is it?

By Mr. Bartoline: It is a marriage certificate.

By Mr. Downing: Wait a minute. The document—I mean, it is all in a foreign language. When the time comes, if he wants to put it in, all right.

178 By the Court: What is it?

By Mr. Bartoline: It is a marriage certificate.

By the Court: Do you contend that it is a marriage certificate?

By Mr. Downing: I do not think it is a marriage certificate. If you read the French there, it is not a marriage certificate. If your Honor please, I have a translation of the front of that back to the inside cover starting here, your Honor. However, it is not for that particular book, but it covers the French translation. I think that page, your Honor, deals with the general items of information that are requested, but the answers apply to another one, not that particular book.

By the Court: I understand.

179 What is the question?

By Mr. Bartoline: I think my question was, if I remember correctly, what that was, if she knew.

By Mr. Downing: To which there was objection.

By the Court: She may answer if she knows.

By Mr. Downing: First of all, I think it ought to be determined whether she knows anything about French.

By the Court: She may answer if she knows what it is. You may cross examine.

By Mr. Bartoline:

Q. I hand you again Marcel Lutwak's Exhibit 2 for identification and ask whether or not you know what that is.

A. It is our marriage certificate which I signed at the Mayor.

Q. In the City Hall?

A. Yes.

By Mr. Downing: I didn't get that.

By Mr. Bartoline: It is the marriage certificate which she signed in the City Hall.

Will you mark this Defendant Mareel Lutwak's Exhibit 3 for identification?

(Document so marked.)

By Mr. Bartoline:

Q. I now show you Defendant Mareel Lutwak's Exhibit 3 for identification and ask you if you have seen this before.

A. It is also a document—

Q. No. The question is, have you seen it before?

A. I can't be sure about it.

Q. You cannot be sure about it?

A. I mean I don't know exact how to express it. It is one of our documents about our marriage, and at the Mayor.

A. At the Mayor's office?

A. Yes.

By Mr. Bartoline: Does the court want to see this?

By the Court: I haven't heard any objection.

By Mr. Bartoline: Mark the Defendant Mareel Lutwak's Exhibits 4 and 5 for identification.

(Documents so marked.)

By Mr. Bartoline:

Q. I now show you Defendant Marcel Lutwak's 181 Exhibits 4 and 5 for identification and ask you if you have ever seen these before?

A. This is our—

By Mr. Downing: Just a minute.

By Mr. Bartoline:

Q. No. Have you seen them before?

A. Yes.

Q. Will you tell us what they are, if you know?

By Mr. Downing: If you Honor please, I object to all this. I still state that if they want to put exhibits in or want to find out about exhibits, they can call a witness at the time they put on their case, and put it in. This has not been covered at all. All this examination as to these last two exhibits and as to these two exhibits—

By the Court: I don't know what these are.

By Mr. Downing: Those things are examinations of the doctor.

By Mr. Bartoline: These are examinations of the doctor as to their physical capacity to marry and whether or not they had any disease.

182 By Mr. Downing: That certainly is not material to the thing. There has not been any charge one way or the other on that, and there certainly was no discussion in the direct examination about that. I think we are just cluttering up the record here. We are asking questions about things which were certainly not covered on direct examination—

By Mr. Bartoline: They covered the marriage.

By the Court: What is the pending question?

By Mr. Bartoline: Is she knows what these documents are.

By the Court: She may answer. Overruled.

By Mr. Bartoline:

Q. Will you tell us what they are?

A. Yes.

By Mr. Eben: May I call your attention to the fact that Mrs. Lutwak is very soft spoken, and I believe the two ladies and the gentleman in the back cannot hear a word that is being said.

Will your Honor ask her to keep her voice up?

183 By the Court: Speak louder.

By the Witness: Yes.

By the Witness:

A. This is the medical examination before—from the doctor.

By Mr. Bartoline:

Q. Of—

A. Myself and my husband, Marcel.

By Mr. Bartoline: That is all.

By Mr. Eben: May I ask four or five questions, your Honor?

By the Court: You have not cross examined yet?

By Mr. Eben: I asked one question before.

By the Court: If you have some questions you forgot, you may now ask them.

By Mr. Eben: Yes,

Cross Examination by Mr. Eben.

Q. Mrs. Lutwak, in replying to me, I am hard of hearing, and if you can make me hear I am sure the other folks on the jury will hear. Will you make an effort to keep your voice up?

184 A. I will try.

Q. When you arrived in Paris you met Marcel, did you not, just four weeks or so before your marriage to Marcel Lutwak?

A. Yes.

Q. You testified this morning that when you arrived in Paris on that occasion that you also met Leopold Knoll as well as several other people, isn't that true?

A. It isn't exactly clear to me what you are asking me, when I arrived to Paris or when Marcel came to Paris. What do you ask me?

Q. You met them there in Paris when you arrived?

A. Yes.

Q. Poldi is Leopold Knoll, this man who sits here, isn't that right?

A. Yes.

Q. The night after you arrived in Paris Mr. Leopold Knoll left Paris, didn't he?

A. I don't think it was exactly the day when I arrived, the day after. It was a few—

Q. Beg your pardon?

A. It was later. It was not on the day when I came to Paris.

185 Q. Did he leave Paris while you were there?

A. Yes.

Q. How soon after you arrived?

By Mr. Downing: I submit that is immaterial, and certainly was not a part of the direct examination.

By the Court: She may answer.

By Mr. Eben: Excuse me. I didn't hear.

By the Court: She may answer.

By Mr. Eben: I think maybe I have been a little confusing about this.

By Mr. Eben:

Q. When Marcel arrived you were already in Paris, isn't that true?

A. Yes.

Q. Isn't it a fact that the day after Marcel arrived from the United States Leopold Knoll left Paris?

A. Yes. He went to a sanitarium.

Q. You and Marcel Lutwak, whom you ultimately married, went around Paris together for approximately four weeks before your marriage?

A. Yes.

Q. Was Leopold Knoll in Paris during that time?

186 A. I don't think—I think he was in the sanitarium, or whatever—

Q. Beg your pardon?

A. He was sick, and he was sent by the doctors to a sanitarium.

Q. Then he was not in Paris, isn't that true?

A. Yes, that is true.

Q. Isn't it a fact that Leopold Knoll did not return to Paris until after you and Marcel Lutwak had been married?

By Mr. Downing: I object to that. That certainly is not material, and it is not proper cross examination.

By the Court: She may answer.

By Mr. Eben:

Q. Shall I repeat it?

A. Yes, if you please.

Q. I said, isn't it a fact that Leopold Knoll did not return to Paris until after you and Marcel Lutwak had been married?

A. Yes.

Q. So then it is also true, is it not, Mrs. Lutwak, that Leopold Knoll was only there for one day when Marcel was in Paris before—Strike that,

187 He was there only for one day during all the four weeks that you and Marcel were running around together before you got married?

A. Yes. Poldi was in a sanitarium.

Q. All right. When you arrived in Chicago I believe you testified you were met at the station by a number of people, isn't that true?

A. Yes.

Q. Was Mrs. Treitler one of those persons who met you at the train?

A. I guess yes. I am not sure. But the family was there.

Q. Isn't it a fact that Marcel's mother was one of the persons who met the train also?

A. Yes.

Q. Marcel's mother was your former sister-in-law, wasn't she?

A. By my first marriage.

Q. To Munio, isn't that right?

A. Yes.

Q. When you arrived here did Marcel engage in any conversation with his mother, yes or no, that is, at the station?

A. Yes.

Q. And it was after that that you went to the home 188 of Mrs. Treitler, isn't that true?

A. We went to Mrs. Treitler's home.

By Mr. Eben: That is all.

By Mr. Downing: Any more cross examination?

By the Court: Any further cross examination?

By Mr. Downing: May I just a moment, your Honor?

Redirect Examination by Mr. Downing.

Q. You were shown on cross examination these two exhibits, Defendants Exhibits 3 and 2, for identification.

Do you read French, Miss Witness? Do you read French?

A. No, not fluently, but I know them. They are our marriage—

Q. You don't read French, however, is that right?

A. No, no, not fluently anyway, but I know what they are.

Q. At the time you were living at 3345 West Maypole Street here in Chicago Mr. Munio Knoll was also living in the same apartment, isn't that right?

A. Yes.

189 Q. And after you went to New York and returned to Chicago the second time, that is, in June of 1948, did you see Marcel Lutwak after you came back to Chicago in June through November, 1948?

A. I tried to see him, but—

Q. Did you see him?

A. I did not, because his mother came—

Q. Just a minute. You didn't see him throughout the whole time between June and November, 1948, isn't that right?

A. No.

Q. And during that time you were in Chicago, is that right?

A. Yes.

By Mr. Downing: That is all.

Recross Examination by Mr. Bartoline.

Q. You say you do not read French, but do you know what these documents were?

A. Yes.

Q. Referring to what defendant Marcel's Exhibit 2—

By the Court: She already told you what they were. Anything else from this witness?

190 By Mr. Bartoline: That is all.

By Mr. Downing: That is all. You may step down.
(Witness excused.)

By Mr. Downing: If your Honor please, at this time the Government would like to offer in evidence Government's Exhibit 19 marked for identification, which is a certified copy of the record of the Superior Court of Cook County, being a decree for divorce in the Superior Court of Cook County on the 31st day of March, 1950, between Marcel M. Lutwak and Maria Irene Lutwak, this being a certified copy under the seal of the Clerk of the Superior Court of Cook County in the State of Illinois.

By Mr. Sokol: For the record, I will object on behalf of Regina Treitler, there being no connection shown as far as the parties were concerned, or any identity with reference to that, of the decree.

And for the record I also object to the testimony just given.

By Mr. Eben: Same objection on behalf of Leopold
191 Knoll.

By Mr. Owen: And as to Munio Knoll, if the Court please.

By the Court: The witness who just left the stand testified she had been divorced.

192 By the Court: The defendant is Maria Irene Lutwak and the plaintiff here is Marcel M. Lutwak. The witness was Maria Lutwak, and I understood her to say

that was the same as Maria. The defendant in this decree is Maria Irene Lutwak. I think that makes sufficient identification. The objection will be overruled and the exhibit may be received.

(Said document, so offered and received in evidence, was marked Government's Exhibit 19.)

By Mr. Downing: Your Honor, may I have permission to read it to the jury, please?

By the Court: Yes.

By Mr. Eben: Has the exhibit been received generally against everyone?

By the Court: At the present time, it will be received against these parties.

By Mr. Downing: I say at the present time it is receivable against all of them.

By the Court: I will receive it for the moment against Marcel M. Lutwak.

196 JOSEPH LUDMER, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct Examination by Mr. Downing.

Q. Will you state your name, please?

A. My name is Joseph Ludmer.

Q. What is your address, Mr. Ludmer?

A. 1615 Hillside avenue, New Hyde Park, Long Island.

197 Q. What is your business or occupation?

A. Farrier.

Q. Where do you have your place of business?

A. Same address.

Q. Do you know the defendants, Munio Knoll, Marcel Lutwak, Regina Treitler and Leopold Knoll?

A. I do.

Q. Do you see them in the court room?

A. Yes, sir.

Q. Will you point them out, please?

A. This is Regina Treitler, Leopold Knoll and Marcel Lutwak and Munio Knoll.

By Mr. Downing: Let the record show that the witness has identified the defendants in the court room.

Q. Are you related to any of the defendants?

A. Through marriage, yes.

Q. When did you first meet the defendant Munio Knoll?

A. Some time between Christmas and New Years, December, 1947.

Q. And the defendant Marcel Lutwak, when did you first meet him?

A. Some time in 1939.

Q. And the defendant Regina Treitler, when did 198 you first meet her as best you recall?

A. 1936.

Q. And the defendant Leopold Knoll, as best you recall, when did you first meet him, approximately?

A. In December of 1947 some time.

Q. Now, directing your attention to the month of December, 1947, to which you have referred, did you have a conversation with any of the defendants regarding their coming to the United States?

A. I had no conversation.

Q. Had you ever had a conversation at which Munio Knoll was present regarding his coming to the United States?

By Mr. Sokol: Objection, leading.

By the Court: You may answer.

By the Witness:

A. I was one evening in the house of Regina Treitler—

By Mr. Downing: Just a minute. That is not the question.

Q. Have you had a conversation at which he was present, yes or no?

A. They had a conversation.

Q. Were you present?

A. I was present.

Q. Approximately when was that, as best you recall?

199 A. In the early part of February, in 1948, in the house of Regina Treitler.

Q. Prior to that time, did you have any conversation or were you present at any conversation?

A. No.

Q. Now, at this time, in February, 1948, where did this conversation take place?

A. In the house of Regina Treitler.

Q. Who was present at that time?

A. Regina Treitler, her husband, her two children, my son, Munio Knoll, and Marcel Lutwak.

Q. Was there anybody else present, that you recall?

A. I don't recall.

By the Court: What was the last person named?

By Mr. Downing: Marcel Lutwak.

Q. Now, as best you can recall, will you relate the substance of that conversation, stating who said what, in your presence?

By Mr. Eben: Objected to on behalf of Leopold Knoll.

By Mr. Sokol: Objection also on behalf of Regina Treitler.

By Mr. Gerber: Objection on behalf of Munio Knoll.
200. By the Court: Just a minute. There is an objection on behalf of Leopold Knoll, and somebody else got up and said something. I don't know what it was.

By Mr. Gerber: I am sorry.

By Mr. Sokol: I am sorry. I am objecting on behalf of Regina Treitler.

By Mr. Gerber: And I am objecting on behalf of Munio Knoll on the ground that he is not mentioned as being present in the conversation.

By Mr. Downing: Oh, yes; he said he was there.

By the Court: Yes. He said he was there.

By Mr. Gerber: I am objecting to it on the further ground there has been no conspiracy shown here as yet, and it is not competent.

By the Court: The objection as to Munio Knoll and Regina Treitler will be overruled. That as to Leopold Knoll will be sustained. Evidence as to the conversation will be received—Marcel Max Lutwak was said to be present?

By Mr. Downing: That is right.

By the Court: The conversation will be received as against Munio Knoll, Marcel Max Lutwak and Regina Treitler. It will not be received presently against Leopold Knoll, and will not be received against him unless a conspiracy is shown.
201

By Mr. Bartoline: I am objecting on behalf of the defendant Marcel Lutwak because this conversation was supposed to be in February, 1948.

By the Court: Objection overruled.

By Mr. Downing:

Q. Will you relate the conversation, stating, in substance, as best you can recall, who said what, identifying the persons talking.

By the Witness:

A. It was on Sunday evening. I arrived from Seattle, Washington, and I drove over to 3345 West Maypole street, which was the residence of Munio Knoll and Mania Knoll.

By Mr. Eben: Just a moment. The jurors are indicating they cannot hear.

By the Court: Speak louder so that the last lady and the last gentleman can hear. Commence again, now.

By the Witness:

A. I arrived Sunday evening from Seattle, Washington; and I drove over—

By Mr. Sokol: If the Court please, he is supposed 202 to tell what the conversation was.

By the Court: Oh, I know that. Let him get started.

By the Witness:

A. I found their home closed, and I drove over to the residence of Irene Lutwak. This was on Maypole street, and I sat down a few minutes in the house. A telephone call came through, and I happened to answer the 'phone. Mrs. Treitler was on the other side, and she recognized my voice, and she asked me to come over immediately to her home, that she had something very important to tell me. Thereafter, I came over to Regina Treitler's home. I sat down for a few minutes. At that time, I was contemplating a business association with her brother, William Knoll, and she asked me not to complete it, not to go through with it. A few minutes later

203 Marcel walked in, and asked me to go back to his house as Munio Knoll was there. There an argument started between Regina Treitler—

By Mr. Eben: I think the characterization, argument, should go out.

By the Court: Well, there was a conversation.

By Mr. Downing:

Q. Now will you state what was said?

By Mr. Gerber: May I make an objection, your Honor, that the answer is not at all responsive to the question.

By the Court: Overruled.

By Mr. Gerber: The place of the conversation was different, your Honor.

By the Court: He has told you where he was. Proceed.

By the Witness:

A. An argument between them started, and later Munio Knoll came into the same house and entered the argument and fight between—

By Mr. Eben: Now, your Honor, I think that should go out.

By the Court: Yes, strike it out. Just state what 204 was said. Don't characterize it.

By Mr. Downing:

Q. Just tell us in substance what was said.

By the Court: Just tell us what was said, and do not characterize it.

By the Witness:

A. That they had got girls to help—

By the Court: Tell us who said that.

By the Witness:

A. Mrs. Regina Treitler said that she had helped them come to this country by getting girls and paying them off. I did not know at that time, or the moment, what it all meant.

By Mr. Eben: That is objected to, your Honor.

By the Court: Strike out what he didn't know. Just tell us what was said and done. If anybody said anything, say who said it, and what they said, and if anybody else said anything, state who said it and what was said.

By the Witness: Your Honor, it was—

By Mr. Downing:

205 Q. No, Regina Treitler said what?

By Mr. Sokol: Just a moment. There is nothing in the record as to what anybody said so far. Don't assume that.

By the Court: Yes, there is.

By Mr. Downing:

Q. After that was said, what else was said?

A. Mrs. Treitler said that she paid the girls off, and Munio Knoll argued that he paid the girls off.

Q. Was there any sum of money mentioned at that time?

A. Yes, sir.

Q. Tell us what was said?

A. Mrs. Treitler said she paid off a thousand dollars each, and Mr. Knoll claimed it cost him ten thousand dollars to bring them all over.

Q. Now, what else was said?

A. Well, the argument was going on back and forth which lasted more than an hour or so.

Q. Do you recall anything else that was said about any payments or what was given to any of these girls at the time they came over?

A. Payments were mentioned in the argument. They said they were given to the girls—

206 By Mr. Eben: I will suggest when this witness proceeds, that he follow the formula, and I think your Honor should make clear to him to say he said and she said, and I think in that way that will obviate all these asides that the witness is giving to the jury.

By the Court: What counsel has said is proper. If you will follow this formula, we won't have any difficulty, and you won't have any interruptions.

Mr. Blank said so and so, if Mr. Blank did, and Mrs. Roe said so and so, and so and so, if she did, and Mrs. Roe said so and so and so and so, if she did say anything, and so on.

If you will just pursue that formula, it will save a lot of wear and tear on the counsel and on the court.

By Mr. Downing:

Q. Do you recall anything else that was said at that particular meeting that you have been testifying about?

A. The argument was going on.

207 By the Court: Don't say "argument".

By the Witness:

A. Mrs. Treitler was arguing.

By the Court: No. She said—

The Witness: Mrs. Treitler said—

By the Court: What?

By the Witness:

A. That she made the payments to the girls, and Mr. Knoll said that he gave the money to pay the girls.

By Mr. Downing:

Q. Is that Mr. Munio Knoll?

A. Mr. Munio Knoll.

Q. All right.

A. That argument was going on between them back and forth.

Q. All right. What else did Mr. Knoll or Mrs. Treitler say at that time? Can you recall anything else at this time about that subject?

A. The details of the procedure were not brought out except the money.

Q. Now, thereafter, that is, after that time, did you have any further conversation with any of the defendants, that is Munio Knoll or Regina Treitler or Marcel Lutwak or Leopold Knoll about this same subject matter you just testified about?

A. After that meeting I never spoke to Mrs. Regina Treitler again.

Q. Thereafter, did you talk to Munio Knoll about the matter?

A. Not about the matter.

Q. Now directing your attention to February, in the same month, February of 1948, did you have occasion to go to the defendant Marcel Lutwak's house?

A. Yes.

Q. Approximately when was that, do you recall?

A. It was on Monday evening. I don't remember the date.

Q. Who was present at that time?

A. In the apartment, only myself and Lutwak.

Q. Did you have a conversation with Marcel at that time?

A. I found him lying in bed with his arm in a plaster cast.

Q. Marcel was lying in bed in his apartment?

A. Yes.

Q. Describe to the court and jury what his condition was at that time.

209 A. I found him lying in bed. His arm was in a plaster cast.

Q. Did you have any conversation with him then at that time?

A. No.

Q. While you were there, did anyone come in?

A. Munio Knoll walked in a few minutes later.

Q. How long did Munio Knoll and yourself remain there at that time?

A. Hardly a few minutes.

Q. Then what did you do?

A. He asked me downstairs, and I drove him to the Union Station?

Q. Who is "he" now?

A. Mr. Knoll called me downstairs to drive him down to the Union Railroad Station.

Q. Is that here in Chicago?

A. Here in Chicago.

Q. Did you have a conversation with the defendant Munio Knoll when you were driving him down to the Union Station? Did you talk to him about any of the defendants in this matter?

By Mr. Gerber: I object. He has already told the District Attorney he never had any other conversation with Munio Knoll about this matter, your Honor.

By the Court: Overruled.

By Mr. Downing:

Q. Tell us what you had a conversation with Munio Knoll about at that time.

A. In the car driving to the Union Station—

By Mr. Eben: Just a moment. In this conversation, the same objection on behalf of Leopold Knoll.

By the Court: For the present, this conversation which is now about to be detailed will be received only as against the defendant Munio Knoll. Proceed.

By the Witness:

Q. Munio Knoll told me in the car that he had suddenly, Saturday night, returned from New York, and was trying to get into his apartment. He had a few minutes hardship to get in, to unlock the door. He finally did get into his apartment, and he told me that Marcel jumped through the window down into the street.

By Mr. Eben: There is another objection to that as being immaterial. It is after any conspiracy or alleged conspiracy came to an end. It is narrative which does not constitute an admission against interest, and I think the whole conversation is completely immaterial.

By the Court: Step into the jury room, ladies and Gentlemen.

212 (Whereupon the following proceedings were had out of the presence and hearing of the jury:)

By the Court: When I ordered the jury out, I hadn't thought quite far enough.

I was going to ask you what your theory is. I guess I can figure one out.

By Mr. Downing: I think it is very easily determined.

By the Court: I am rather slow on the uptake sometimes.

Who made that objection?

By Mr. Eben: I made it.

By the Court: What have you to urge?

By Mr. Eben: My objection is based on a number of grounds, the first one of which your Honor already sustained, at least on the grounds that conspiracy not having yet been proved, it will be limited for the time being or presently to the defendant Munio Knoll.

Further, even if a conspiracy had been proved already, and your Honor might at some future time decide to let the conversation go in against my client, it is not an act or declaration in furtherance or pursuance of the conspiracy.

Furthermore, I think your Honor should instruct 213 the jury even in the event it is ever received, it is not the truth of the matter which the man says, but merely his statement as to what somebody else said in the thing.

In addition, I also urge on the court this is a matter which happened some time after the alleged conspiracy came to an end, that is, after the two men had arrived from Europe, and the lady involved.

That is the extent of my objection.

By Mr. Sokol: In further support of that, there is no evidence in the record yet with respect to any entries other than that of Maria Lutwak. Furthermore, that the testimony of this witness has related to persons other than the entry of Maria Lutwak, and no conspiracy has been shown.

With respect to the conversation relating to the manner in which something has been obtained, this witness is being tendered to testify in respect to a conversation, as Mr. Eben suggested, which took place a good deal of time after the one entry, let us say, the first and only entry which is in the record, and did not relate to this witness at all.

By the Court: Well, I don't think the conversation 214 could hardly be said to be in pursuance of the conspiracy, in the terms of the indictment.

By Mr. Downing: Why, your Honor, they were talking about what was paid to get into the—

By the Court: No, no, no, about a man jumping out of a window.

By Mr. Bartoline: Yes.

By Mr. Downing: I thought he was talking about the latter part of his argument. I am not so sure that is not very directly material to this conspiracy.

By the Court: I did not say it is immaterial. I said it could hardly be said to have been said in pursuance of the conspiracy, but I think what Mr. Munio Knoll said to the witness certainly would be admissible against him.

Bring in the jury.

By Mr. Bartoline: Except here, if the Court please, the conversation is that he, Munio Knoll, told him what was supposed to have happened, and he charges someone else with having done something.

I am representing Marcel Lutwak and I am making my objection on that score.

By the Court: I am admitting it as against Munio Knoll, nobody else.

215 By Mr. Bartoline: All right.

(Whereupon the following proceedings were had in the presence and hearing of the jury:)

By the Court: Ladies and gentlemen, the conversation which the witness detailed between himself and the defendant, Mr. Munio Knoll, in the automobile on the way to the railroad station, and relating to someone's having jumped from a window, is received and is to be considered by you only as against the defendant Munio Knoll, and nobody else.

By Mr. Downing:

Q. Is there anything more that you have not already testified to concerning this conversation? What else did Munio Knoll tell you at that time, that is, while you were on the way to the Union Station?

A. Nothing further was discussed.

Q. Pardon?

A. Nothing was further discussed.

Q. After you arrived at the Union Station, what did you do?

A. He bought a ticket to New York.

Q. Thereafter where did you go?

216 A. We returned back to home.

Q. And where was that to? Was that to Munio Knoll's?

A. No, I had a furnished room and I went back home by myself, left him.

Q. Where did you last see Munio Knoll?

A. The following day.

Q. Did you leave him at the Union Station?

A. No, no, he returned to my car.

Q. Then where did you take him?

A. I think back to his apartment.

Q. Is that the apartment you have referred to as 3345 Maypole?

A. That is right.

Q. Did you go to his apartment with him after you took him to that address?

A. The next day.

Q. Who was present the next day?

A. Munio Knoll.

Q. Anyone else present?

A. He took his luggage for his wife, and he asked me to drive to the Union Station—

Q. And whom did you drive down to the Union Station?

A. His wife, Mania.

By Mr. Eben: I object to that. That is a complete conclusion and I think the jury should be instructed to disregard it.

By Mr. Downing: This man said he told him he wanted to drive his wife to the station—

By Mr. Eben: No.

By Mr. Downing: He testified to that.

By Mr. Sokol: That is Mr. Downing's characterization.

By Mr. Downing: Let the record be read.

By the Court: What did Mr. Knoll say?

By the Witness: He asked me to drive his wife Mania to the Union Station, which I did.

By Mr. Downing:

Q. Have you seen Mania in or about this court room today?

A. I saw, past in the hall.

By the Court: You saw Mania in the hall today?

By the Witness: Yes.

By Mr. Eben: I object also to this conversation on behalf of Leopold Knoll.

By the Court: It is received. I told the jury that this conversation is received only as against the defendant Munio Knoll.

By Mr. Eben: I understand that completely, but 218 then the new conversation comes along.

By the Court: It is received only as against Munio Knoll.

By Mr. Downing:

Q. Where did you take Mania to at that time?

A. To the Union Station, rail station.

Q. Did anyone else accompany you and Mania?

A. Nobody was in the car besides her.

Q. Did she board a train at that time, if you know?

A. She boarded a train and she left for New York.

Q. Directing your attention to the Sunday preceding this Monday that you had a conversation with Munio Knoll, about which you have testified, did you see the defendant Marcel Lutwak on that day?

A. That Sunday?

Q. The Sunday before, yes.

A. Yes. I saw him during the day.

Q. Where did you see him during the day, that is, on the Sunday?

A. During the afternoon hours I was visiting a niece.

Q. And who was there, if you remember?

A. That is a daughter of Mrs. Sager. I don't remember her marriage name.

219 Q. Who was with you and Marcel, if anyone, at that time?

A. Mr. and Mrs. Sager. Mania Knoll was there and Marcel Lutwak was there.

Q. By the way, when you were acquainted with Mania here in Chicago, what was the last name that you knew her by?

A. It was Mrs. Knoll.

Q. Now, on this Sunday preceding the day you had this conversation with Marcel Lutwak,—strike it.

The day preceding the day you had the conversation with Munio Knoll, did Marcel Lutwak on that Sunday have the same cast on his arm that you observed him with on Monday in his residence?

A. No, sir.

Q. Did he have any kind of a cast on his arm on that Sunday?

A. No, sir.

Q. Where did you leave Marcel that Sunday?

A. Sunday evening we all returned back from home and I left them all off at their own homes.

Q. Each at their respective homes?

A. That is right.

Q. And where did you leave off Mania?

220 A. Also in her own home.

Q. What was the address of her home?

A. It was 3345, I believe, Maypole.

Q. Is that the same apartment building that Munio Knoll, that you visited Knoll at?

A. That is right.

Q. And where did you leave Marcel Lutwak?

A. At his home.

Q. And do you recall what street that was on?

A. That was 42, I believe, or 44 West Madison—I don't—

Q. Madison street?

A. Madison street. I don't recall the exact number.

Q. Mrs. Sager, do you recall what street she lived on?

A. I don't recall the number, but it was West Adams street.

Q. Directing your attention to this address at 3345 West Maypole, prior to the time that you had this conversation with Munio Knoll, about which you testified, had you had occasion to visit his residence at that time at that address?

A. Yes, sir.

Q. And between the 1st of January, 1948, and up to the time this event took place, approximately how
221 many times did you have occasion to visit this place?

A. Most every day. In the morning I used to pick him up and take him downtown, because we was supposed to fix up a loft for a business.

Q. Were you contemplating going in business with Munio Knoll?

A. That is right, sir.

Q. Do you recall what floor Munio Knoll's apartment was?

A. It was on the third floor, I believe.

Q. Do you recall how many rooms there were in this apartment?

A. One bed room and a living room and a kitchenette, small kitchen.

Q. Did you ever have occasion to see anyone there besides Munio Knoll, that is, in the mornings when you would go there?

A. Mrs. Mania Knoll and Munio Knoll.

Q. Did you ever see anyone there other than those two in the mornings when you would go there?

A. No, sir.

Q. Pardon?

A. No, sir.

By Mr. Downing: You may cross examine.

222 By Mr. Sokol:

Q. Directing your attention to this telephone call you say you received from Mrs. Treitler in the first instance she did not ask you your advice over the telephone at that time, did she?

A. No, she asked me to come over to her house.

Q. To come over, and did she ask you for advice when you came over there? No one asked you for any advice when you came over to the apartment?

A. In what respect?

Q. I am asking you, no one asked you for any advice when you came over to this apartment?

A. I don't get that word, advice. In what respect, advice?

Q. Did anyone ask you for your help? No one asked you for any help when you came over to that apartment in response to that 'phone call you got?

By Mr. Downing: If your Honor please—

By the Witness: I don't get the word "help" or "advice".

By Mr. Downing: First of all, I don't think it is material to any—

By Mr. Sokol: I have just begun. I would like 223 to have an opportunity to at least get started.

By Mr. Downing: The rules don't say that we do not have a right to object, regardless of when you begin.

By the Court: The witness says he does not understand the use of the word "advice". He doesn't understand "help".

By Mr. Sokol: He seems to have understood Mr. Downing rather well.

By the Court: No, strike out that observation.

By Mr. Sokol:

Q. You came from Seattle for the purpose of going into business, isn't that right?

A. Yes.

Q. You intended, when you came from Seattle, to find someone in Chicago either who had capital or who would be able to help you in business?

A. We talked that before, yes.

Q. It was your intention, that you would get some bond or association so that you might go into business with someone else, using either capital or materials, or something else, that would set up a fur business?

A. I have not talked to somebody else except Munio Knoll.

224 Q. I am speaking of your intentions when you first came to Chicago from Seattle?

A. Yes.

Q. At the time you came over to this apartment, you had just come into Chicago from Seattle, isn't that right?

A. Yes.

Q. You say you got this telephone call and someone said, or Mrs. Treitler said, "Come over to this apartment," and you have said you were not asked for any help or any advice in this conversation. Were you asked for any assistance? Were you asked to give your assistance to anyone in this apartment at that time. You were not, were you?

A. No, I was not.

Q. You merely sat there and listened, isn't that right? You want us to believe you heard this story and you merely sat there and listened; isn't that right?

A. Just a minute, sir, I didn't get that.

By Mr. Sokol: Read the question back, Mr. Reporter.
(The last question was read by the Reporter.)

225 By the Witness:

A. Yes, but this has happened after Marcel followed me into the apartment—

By Mr. Sokol: That is all. I move the rest be stricken.

By Mr. Downing: I think it is responsive.

By the Court: Let it stand.

By Mr. Downing: He asked for it. He got it.

By Mr. Sokol:

Q. You had a conversation with Mrs. Treitler about going into business, did you not?

A. I had no conversation with Mrs. Treitler about going in business.

Q. You had some conversation, did you not, in which Mrs. Treitler suggested to you that your personality and Munio's personality might not match and you would not be good business partners, did you not?

By Mr. Downing: I object. All these alleged conversations with Mrs. Treitler or anyone else about going into business, there was one question I admit I asked on direct examination about, did he go or was he contemplating going into business with Munio Knoll? There was not anything about any business conversations at this particular meeting that they had up there in Mrs. Treitler's apartment to which he testified, and I think it is beyond the direct examination.

By the Court: Oh, he may answer; he may answer.

By Mr. Sokol: Read the question.

(The following question was read by the Reporter:)

"Q. You had some conversation, did you not in which Mrs. Treitler suggested to you that your personality and Munio's personality might not match and you would not be good business partners, did you not?"

By the witness:

A. This conversation did not happen in that evening.

By Mr. Sokol:

Q. But you did at such time have such a conversation?

A. The conversations all happened before my arrival—before that.

Q. Yes, but you did have that conversation, did you not?

A. Well, naturally, I had to have conversations of contemplating going into business.

Q. You can just say yes or no, Mr. Witness. You did have such a conversation, did you not?

227 A. With Mr. Munio, no?

Q. No.

Will you read back the question?

(The following question was read by the Reporter:

"Q. You had some conversation, did you not in which Mrs. Treitler suggested to you that your personality and Munio's personality might not match and you would not be good business partners, did you not?"

By The Witness:

A. Yes, that happened—

By Mr. Sokol: Fine. We finally got it.

By Mr. Downing: If your Honor please, I move to strike that out.

By The Court: Strike out that observation of counsel.

By Mr. Sokol: I am sorry. I will apologize for that.

Q. You did not follow Mrs. Treitler's advice, but you did go into business with Munio Knoll?

A. I did not go in business with Munio Knoll.

228 Q. Isn't it a fact that at some time you did associate yourself in business with Munio Knoll?

A. I did not associate myself in business with Munio Knoll.

Q. What business relationship did you have with him thereafter?

A. I was waiting trying to get associated, but it never materialized.

Q. Ah hah, but you did make some previous plans, did you not?

A. Yes.

Q. And you discussed what kind of a business, isn't that right?

A. Yes.

Q. And you discussed what you would sell or manufacture, isn't that right?

A. Yes.

Q. Now, you had a falling-out with Munio Knoll, didn't you, that ended in disagreement, did it not?

A. I broke away from him, yes.

Q. All right, and the parties were bitter on both sides, were they not, after this breaking up?

By Mr. Downing: Objection.

By The Court: Overruled.

229 By Mr. Sokol:

Q. What do you mean, you were bitter after this agreement or preliminary arrangement broke up? You can answer that question.

A. I don't know. Can I answer that question?

By The Court: If you can.

By The Witness: I will not answer that question because it will carry you too far in.

By Mr. Downing: If the court please--

By Mr. Sokol: Wait a minute. I want to hear that. I didn't hear it, and I want to hear it.

By Mr. Downing: I will tell you what he means. I would rather tell you--

By Mr. Sokol: I want to hear the answer, because I didn't hear it. What was the answer?

(Last answer was read by the reporter.)

By The Witness: Not you. It will carry the matter too far in. It is painful to me.. It is painful to me.

230 By Mr. Downing: I will explain it out of the presence of the jury, your Honor.

By The Court: I don't know, if counsel wants to go ahead—

By Mr. Downing: I am just making the statement.

By Mr. Sokol:

Q. I have asked you this question, and this is the answer—I will not tell you what the answer is, but I am suggesting to you this, that as a result of this break up of your preliminary arrangement there was bitterness on both sides, Munio Knoll was bitter with you and you were bitter with Munio Knoll? Wasn't there some anger or excitement or disappointment on both sides?

By Mr. Downing: If you Honor please—

By The Witness: Just a moment.

By Mr. Downing: He asked for three different types of emotions there.

By The Court: Yes.

By Mr. Downing: I think we had better characterize something.

By Mr. Sokol: I have a right to lead.

By The Court: Ask him whether there was anger.

231 By Mr. Sokol:

Q. You were angry when this thing broke up?

A. Just a minute, sir. May I ask a question, your Honor?

By The Court: Yes.

By The Witness: As I understand it, you are defending Mrs. Treitler?

By Mr. Sokol:

Q. That is right.

A. I have no further to say against Mrs. Treitler, what you are involving me against Mr. Munio Knoll, about the bitterness—as I understand, the court is here in an entirely different procedure, and not against my personal bitterness, so I would eliminate further questioning.

By Mr. Sokol: If the Court please, I think in fairness to this witness I should merely indicate this—all I have wanted to find out was this thing, and actually he has answered my question and I would be content with what he has just said.

He has indicated what—

By The Court: He has indicated whatever he indicated.

232 By Mr. Sokol: That there was bad feeling as a result—

By The Court: No. I indicated to you to leave that alone, and when I indicate a thing like that to counsel I mean you to follow my suggestion.

By Mr. Sokol: I have no intention of disobeying the court.

By The Court: Then do as I say.

By Mr. Sokol: Very well. Excuse me just a moment. No further cross examination.

By Mr. Eben: I have a few questions.

Cross Examination by Mr. Eben.

Q. Mr. Ludmer, you have testified here pursuant to a subpoena served upon you by the Government, isn't that true?

A. Yes.

Q. What?

A. Yes, sir.

Q. And prior to testifying here you also testified before the Grand Jury, didn't you?

233 A. Not before the Grand Jury.

Q. Did you testify before a grand jury here in the Northern District of Illinois, the City of Chicago, at any time in connection with this case?

A. Not for a grand jury. Not for a grand jury.

Q. Did you testify in some other place in connection with this case?

A. I testified in some other place, yes.

Q. Where?

A. In Justice Department. I don't know what you call it.

Q. You mean a statement was taken from you, isn't that right?

A. Yes, that is right.

Q. Was that statement taken here in Chicago?

A. It was taken here in Chicago.

Q. Now, after these happenings which you have related on direct examination you moved to New York, I gather from your present address, is that true?

A. I didn't get that, sir.

Q. You say you live on Long Island now?

A. Yes.

Q. New Hyde Park?

A. Yes.

234 Q. When did you move there?

A. I moved there in December, '48.

Q. In December of 1948?

A. Yes.

Q. You were living in New York at the time these alleged conversations took place with Mrs. Treitler and Munio, isn't that right?

A. I was living in Seattle, Washington.

Q. Excuse me?

A. Seattle, Washington.

Q. You were living in Seattle and then you moved to New York, isn't that right?

A. Yes.

Q. When did you first come to this country?

A. In 1934.

Q. 1934?

A. Yes, sir.

Q. I assume you are a citizen?

A. That is right, sir.

Q. When did you take out your citizenship?

A. November, 1939.

Q. 1939. Now, after you moved to New York in December of 1948, did any officer or official of the Government call upon you relative to this particular case?

A. I didn't get it, sir.

Q. I will put it to you differently. When was the first time you talked with the Government about this case?

A. The first time?

Q. The first time.

A. The first time I spoke about this case to government officials was in New York.

Q. When?

A. Beg your pardon?

Q. When?

A. It would be sometime in July or August of 1948.

Q. 1948?

A. Yes.

Q. All right. That conversation took place in your home, didn't it?

A. No, sir.

Q. In your office?

A. No, sir. I went—

Q. In the office of a representative of the Immigration and Naturalization Service?

A. Right, sir.

Q. How did you happen to go to that office?

236 By Mr. Downing: I object, how he happened to go there.

By Mr. Eben: That goes to his credibility.

By The Court: He may answer.

By The Witness:

A. How did I—On my own free will.

By Mr. Eben:

Q. On your own free will?

A. That is right.

Q. The Government did not come to you, did they, first? You went to them first?

A. Right, sir.

Q. And at that time you told the Government the story substantially as you have related it here, isn't that right?

A. Yes.

Q. And you did that because you had made a demand on Munio Knoll for some money and he had refused to give it to you, and thereupon you said you would turn him in to the Immigration and Naturalization authorities, isn't that true?

A. No, this is not true.

Q. That is not true?

A. This is not true.

237 Q. All right. Nevertheless, you were the one who went to the immigration authorities?

A. Yes, sir.

Q. And I assume that when you went it was because of the great love you had for your new country, is that right?

A. I didn't get that right, sir.

By Mr. Eben: Repeat it, please.

(Question read.)

By The Witness: I don't get the question, sir.

By Mr. Eben:

Q. Why did you go? I will ask you a wide open question. Why did you turn Munio Knoll and these other people in?

A. I have not started that matter off. That matter was

started on the other side, and I was indirectly brought into the picture.

238 By Mr. Downing: If your Honor please—

By The Witness: If this is—I have to answer that way.

By Mr. Downing: He has answered it.

By Mr. Eben:

Q. Whom do you mean by the other side?

A. The witness will appear probably tomorrow, I believe.

Q. Who are they?

By Mr. Downing: Just a moment.

By The Witness: Am I supposed to speak for somebody else?

By Mr. Downing: Anybody that can testify will be here as a witness.

By Mr. Eben: It goes to his bias and partisanship.

By The Court: He says he did not start it. That has been exhausted.

By Mr. Eben: I did not hear your Honor.

By The Court: I said I think you have about exhausted the possibilities of it. He did talk to the Examiner of Immigration, but he said he did not start the matter.

By Mr. Eben:

239 Q. You say somebody else started it, isn't that true?

A. Yes.

Q. And do you know who that person was?

By Mr. Downing: I object. I say it is immaterial as far as this witness is concerned. He has admitted testifying and talking to the immigration officials, and I think that is as much as he can testify about.

By Mr. Eben: On the state of the record now he apparently of his own free will and voluntarily went down there. I would like to find out why and how.

By The Court: He says somebody else started it.

By Mr. Eben: If somebody else told him then I would like to pursue that if I may.

By The Court: Were you asked to go down to the immigration office?

By The Witness: I was called up from the party that had started that matter to the Government also to testify as far as I knew the things. So I went on my own free

240 will and testified.

By Mr. Eben:

Q. What I would like to know is, who is this party that called you up?

By Mr. Downing: I have no objection.

By The Court: Let him answer.

By Mr. Downing: If he knows.

By Mr. Eben:

Q. Who was that party?

A. Mr. Morris Haberman.

Q. Is he here in Chicago now?

A. He is in Chicago now.

Q. We will probably hear from him later.

By Mr. Downing: I object and ask it be stricken.

By The Court: Strike it out.

By Mr. Downing: And counsel should be warned about side remarks.

By Mr. Eben:

Q. Have you been promised a reward for your testimony here?

A. I have not been promised any reward. In what connection, sir?

241 Q. Has anybody promised you any money for your testimony, any reward?

A. No, sir.

Q. You know what a reward is, don't you?

A. I don't know that question exactly, into what way to answer. Is this expenses, governmental expenses?

Q. This isn't the first time—

A. I don't know that question.

Q. Have you finished?

A. Yes.

Q. Have you finished?

A. Yes, sir.

Q. This is not the first time you have turned people in to authorities, is it?

By Mr. Downing: Objection.

By The Court: Sustained.

By The Witness: Just a minute. What was that?

By Mr. Downing: Just a minute.

By The Court: Sustained.

By Mr. Eben:

Q. Did you reduce your statement to writing, the
242 statement that you made here today?

By Mr. Downing: Objection, unless he describes

where that statement was made and when. He may be talking about many things. The question is not definite.

By The Court: He may answer.

By Mr. Eben:

Q. Have you written out your statement?

A. Myself, this statement?

Q. Yes, sir.

A. No, sir.

Q. Beg your pardon?

A. Today?

Q. At any time.

A. I have given testimony.

Q. Have you ever written it out?

A. Myself, write it out?

Q. Yes, did you ever write it out?

A. No, sir.

Q. Did you have somebody else write it out for you?

A. The authorities wrote down whatever I—

Q. Who?

A. Wherever I gave the testimony, they wrote it down.

243 Q. Do you have in your pocket now any notes relative to your testimony?

A. No, sir.

Q. Nothing at all?

A. No, sir.

Q. Did you bring any here to this court house today with you?

A. No, sir.

Q. Didn't you memorize your testimony?

A. I don't know what—in what respect, memorize?

Q. Do you know what "memorize" means?

A. Yes.

Q. Did you memorize the testimony you were going to give here, and did give?

A. In what connection, have I got to answer that? I have a memory to remember things that happened.

Q. And did you commit what you were going to say here to memory?

By Mr. Downing: If your Honor please—

By the Witness: I don't know what "commit"—

By Mr. Downing: He has answered the question, and he says he had a memory and remembers it. Counsel is trying to badger the witness further and further—

244 By the Court: I think you have exhausted the possibilities. His testimony was not so elaborate that it had to be written down and committed to memory.

By Mr. Eben: May I have the court's indulgence for a second?

By Mr. Eben:

Q. You said that you came here in approximately 1934. By here mean the United States. Is that right?

A. Yes, sir.

By Mr. Downing: Objection to this line of question, repetitious.

By the Court: Sustained.

By Mr. Eben: I am coming up to a thing.

By Mr. Eben:

Q. Prior to your coming here did you live in Berlin?

By Mr. Downing: I object to where he lived.

By the Court: Sustained.

By the Witness: What has that to do—

By the Court: Sustained. You don't need to answer that.

By the Witness: I am sorry.

By Mr. Eben:

245 Q. Isn't it a fact that prior to your coming here, and when you lived in Germany that you worked for the Gestapo?

By Mr. Downing: I object.

By the Witness: No, my goodness, I wish—

By Mr. Downing: I object.

By the Court: Sit down, and keep quiet when I—

By Mr. Eben: That is all.

Cross Examination by Mr. Bartoline.

Q. Mr. Ludmer, you testified that in February of 1948 you were present at a conversation where Marcel Lutwak was also present, is that correct?

A. Is this referring to that evening in the house of Regina Treitler?

Q. I am asking you whether that is what you testified to. Do you remember testifying here to that effect?

A. Just a minute.

By Mr. Downing: If your Honor please, I think the question is confusing. I think there is testimony about three or four different meetings. He is just now
246 asking about one conversation, with respect to a

particular month in which this man has testified about other meetings. I think of he wants a particular meeting—

By the Court: I think the question was warranted. If you want to really know what he knows I think it would be well for you to answer him; I think his inquiry of you was reasonable.

By Mr. Bartoline: Do you mean his inquiry of me, sir?

By the Court: Yes, sir.

By the Witness: What did he ask?

(The following answer was read by the reporter):

"A. Is this referring to that evening in the house of Regina Treitler?"

By Mr. Bartoline: Yes.

By Mr. Bartoline:

Q. Did you see Marcel Lutwak there?

A. Yes.

Q. How long was he there?

A. He was at least an hour to an hour and a half.

Q. He was there that long?

247 A. Yes.

Q. Was he present when these conversations were going on between Munio and Mrs. Treitler?

A. Yes, he was all the time, while they were arguing.

248 Q. Did he enter into the conversation at all?

A. He had an argument first, before Mr. Munio Knoll entered into that argument.

Q. Who had an argument?

A. Marcel Lutwak and Regina Treitler.

Q. Did you testify that Marcel asked you to go back to his house that evening?

A. That is right.

Q. And did you go?

A. After the argument quietened down some time later in the evening, yes, I went over.

Q. And you went with Marcel, isn't that correct?

A. Marcel and Munio Knoll after we left Regina Treitler's house.

Q. Where did you go?

A. To sleep over at Maria Lutwak's house.

Q. Now, how many times did you see Marcel from December of 1947 to the present date?

A. While I was in Chicago I have seen him most every day.

Q. You testified, however, to only two conversations, isn't that true?

A. I can see him and not have conversations.

Q. I am asking you whether that is the—

249 A. You asked me if I have seen him. I have seen him most every day.

Q. And you have had conversations with him on these occasions?

A. Conversations were going on from time to time.

Q. Did you ever see him in the apartment of Mrs. Lutwak, Maria Lutwak?

A. If I ever seen him?

Q. Yes, in the apartment of Maria Lutwak?

By Mr. Downing: If your Honor please—

By the Witness:

A. What Maria Lutwak?

By Mr. Bartoline:

Q. Mania. Do you know Mania?

A. Yes, Mania Knoll.

By Mr. Bartoline: I object, if the Court please. I asked him if he saw him in the apartment of Maria Lutwak.

A. Certainly, we used to come up there and sit and talk when her husband was present, when I was present, she would be present.

By Mr. Bartoline: That is all.

Cross Examination by Mr. Gerber.

250 Q. Mr. Ludmer, what is your relationship to the defendant, Munio Knoll?

A. My wife is their first cousin.

Q. Your wife is Munio Knoll's first cousin?

A. Right, sir.

Q. May I ask, how long have you been married to your wife?

By Mr. Downing: I object. What is the materiality of that?

By the Court: Sustained.

By Mr. Gerber:

Q. You have stated on direct examination that you overheard the conversation that you discussed at Mrs. Treitler's home in February of 1948, is that correct?

A. That is right. After the evening, when I returned from Seattle to Chicago.

Q. Did I understand you on cross examination by one of the counsel here, that at that time you had not had any business transactions with Munio Knoll?

A. The set-up was not perfected at that time.

Q. Had you had any business transactions with him up till that time?

A. It was all in a—

Q. May I have a yes or no answer?

251 By Mr. Downing: Just a minute.

By the Witness: I don't know how business transactions—it wasn't five minutes. It took a long time.

By Mr. Gerber:

Q. Had you had any business transactions with him up to that time, yes or no?

A. We contemplated to have a business.

Q. My question is simple.

By the Court: No, it is not simple.

By Mr. Downing: No, it is not.

By the Court: Had you talked business with him before that time?

By the Witness: We discussed several times of future business association.

By the Court: Had you consummated any deals prior to that time?

By the Witness: Not complete.

By Mr. Gerber:

Q. Had you engaged in any financial transactions in connection with these business deals with Munio Knoll prior to that time?

A. Just a minute. What was that?

To a certain extent, yes.

Q. To what extent? Don't you understand the 252 question?

By Mr. Downing: Just a minute. The witness is trying—

By the Witness: I don't know what to answer on that question.

By Mr. Gerber:

Q. I want to make it clearer.

A. I don't know, in what connection?

Q. You stated "to a certain extent." I am now asking you, to what extent are you talking about, when you say to a certain extent?

A. Because we had already taken a loft which was supposed to be fixed up for a future business. If this is the question I have to answer, I don't know what it means.

Q. Can you tell us to what extent you had engaged in any financial or business transactions with Munio Knoll preceding February of 1948 of any kind and description in connection with the business you have been talking about going into?

A. We were planning to get set up a business.

Q. Yes.

A. But nothing definite and nothing final was done because I could not find a way to get to an agreement, to come to an agreement.

Q. Were there any money transactions or financial transactions up to February of 1948?

A. Yes.

Q. What were they?

By Mr. Downing: Just a minute.

By the Witness: I don't know. In what—

By Mr. Downing: Money transactions can be passing a nickel back and forth. I think we are—

By Mr. Sokol: That is what we are trying to find out.

By the Court: Tell us in a general way. Tell us in a general way, what monetary transactions you had, if any?

By the Witness: Yes, I had received some money, but it was for merchandise that belonged to me and was sold, partly sold. It was some money I received, and the rest of the merchandise was still around.

254 By Mr. Gerber:

Q. Did Munio Knoll sign any instrument or undertaking to pay any obligations to your creditors for you prior to February, 1948, sir?

A. To a certain extent, he did.

Q. To what extent, please?

A. It was all my own money for my own sold merchandise, and I wish, if it were possible—

Q. I will repeat my question, please. Did Munio Knoll either pay to any of your creditors money which you owed your creditors, or sign notes or any other papers obligating Munio Knoll to pay any of those creditors any money you owed to those creditors prior to February, 1948? Did he or did he not?

A. Yes.

Q. Do you know approximately in what amount he assumed obligations of yours to your creditors at that time?

A. Well, it could be three or four thousand dollars.

Q. It was not \$12,000, was it?

A. No, sir.

Q. It was not more than three or four thousand, you say, is that correct, sir? Did I understand you right?

255 By Mr. Downing: His answer was about three or four thousand.

By the Witness:

A. I don't know. I have not got any papers on hand right now to quote exactly what it was.

By Mr. Gerber:

Q. If your memory was refreshed, you would be able to tell us?

By the Court: What is your best recollection? Let us get going. What is your best recollection as to the obligations, if any, Mr. Knoll, Munio Knoll, had incurred?

By the Witness:

A. Those obligations were only to perform his part, that he was going—

By Mr. Gerber: I ask that be stricken as not responsive. I asked him the amount of the obligations.

A. I don't know exactly the amount.

By the Court: What is your best recollection?

By the Witness:

A. Because he was immediately paid back for merchandise that was mine, and I don't know how it could be divided between my own money, and maybe to a certain
256 extent it was a part his money, but it was mostly money which was still mine for my own merchandise. I don't know how to divide it.

By Mr. Gerber:

Q. How much over and above the value of your merchandise did he assume of your obligations to creditors?

A. The value of my merchandise?

Q. Yes.

A. None.

Q. Let me put it this way: How much above the value agreed between you and Munio Knoll of your merchandise did he extend credit for you?

A. This could be eliminated because it is not the case, because—

Q. Will you answer my question? I would like the witness to be responsive.

By the Court: Just answer the question, and let this be the last question along that line.

By Mr. Gerber: Read the question.

(The last question was read by the Reporter.)

By the Witness:

A. None.

By Mr. Gerber:

Q. You have stated on your examination heretofore that you at no time did go into business with Munio Knoll, is that correct, sir?

A. That is right.

Q. Was there a loft or space rented for business by you or Munio Knoll at that time?

A. Yes, not rented definitely. He had just had the receipt to be rented.

Q. What address was that located?

A. 305 West Adams street.

Q. Was there machinery and merchandise moved in there for the operation of the business there?

A. Yes, sir.

Q. Did you both operate the business there?

A. Not operating it yet.

By Mr. Downing: Objection to any further questions along this line. I think he has pursued it far enough.

By the Court: I think you have. The only possibility of materiality would be to credibility, and he has told you they were angry with each other. So, what is the use of just spending all afternoon on it. Take up some other subject.

By Mr. Gerber: I am leading up to impeachment, your Honor.

258 By the Court: You cannot impeach on immaterial matter. I was telling you to take up some other subject.

By Mr. Downing: If your Honor please, I—

By Mr. Gerber: Go ahead. Do you want to make a statement?

By Mr. Downing: You conduct your lawsuit and I will conduct mine.

By Mr. Gerber: I just thought you wanted to make a statement. I didn't say anything out of line. I am trying to be polite.

By Mr. Gerber:

Q. Mr. Ludmer, when you went to the Immigration Office to, as you say, voluntarily report these people for violation, you have stated, have you not, that you had not made any demand on Munio Knoll for any money at that time, is that correct, sir?

A. That is correct.

Q. At what time did you go to the Immigration Office to report this matter?

By the Court: He never said he went to the Immigration Office to report it. He said that he went to the Immigration Office voluntarily, of his own free will, because somebody else had reported it to Mr. Haberman. That is what he said.

By Mr. Gerber:

Q. When you went to the Immigration Office, were you questioned on the first occasion?

By Mr. Downing: Objection, your Honor. I think we have gone over this question.

By the Court: Sustained.

260 By Mr. Gerber:

Q. Mr. Ludmer, will you please give us when it was when you went to the immigration office?

By Mr. Downing: I object to repetition, your Honor.

By the Court: Sustained. We have spent enough time on that.

By Mr. Gerber: I don't think the date was ever brought out.

By the Court: Somebody else has exhausted the possibilities of that.

By Mr. Gerber: What was the date?

By Mr. Downing: The record shows.

By Mr. Gerber: May I have the record? I would like to ask a question about it.

By Mr. Eben: July, 1948.

By the Court: July, 1948.

By Mr. Gerber:

Q. Did you know, Mr. Ludmer, that your wife had been corresponding with the defendant, Munio Knoll, before you went to the immigration office in July of 1948?

By Mr. Downing: Just a minute. Let us get this record straight. This is Mr. Ludmer.

261 By Mr. Gerber: I am sorry.

By Mr. Gerber:

Q. Mr. Ludmer, did you know at the time you went to the immigration office in July of 1948 that your wife had had a communication with the defendant Munio Knoll?

By Mr. Downing: I object to this.

By the Court: Sustained.

By Mr. Gerber: May I be heard on a matter I want to present, your Honor?

By the Court: Step into the jury room, Ladies and Gentlemen.

(The following proceedings were thereupon had out of the presence and hearing of the jury:)

By Mr. Gerber: If I may, your Honor, I would like to discuss this outside of the presence of this witness.

By the Court: Step into chambers.

(Witness retires from court room.)

By Mr. Gerber: If your Honor please, I have in my possession a letter with its envelope postmarked October, 1948.

That is subsequent to July, 1948, when he said he went 262 to the immigration office.

This letter is in the handwriting, and the envelope too, of this witness' wife. It is written in German, and it can be interpreted.

In this letter she tells my client, Munio Knoll, unless in eight days' time he hands over \$15,000, she is going to turn him over to the immigration office.

By Mr. Downing: That is not this witness—

By Mr. Gerber: Now let me talk.

Your Honor, I am only saying this, I am only asking the witness if he had any knowledge of a communication by his wife. I am trying to discover whether he inspired writing anything to him. I am trying to discover if he had any knowledge of the alleged blackmail.

If he has, it has something to do with the bias and prejudice that he is showing here.

This letter is absolutely evidence of blackmail, nothing more. I think we ought to go into this matter on behalf 263 of these defendants.

By the Court: Have you seen this letter?

By Mr. Downing: No, sir, I have never heard of it.

By Mr. Eben: It is in German.

By Mr. Gerber: I can have it interpreted.

By Mr. Sokol: Possibly Mr. Lawson can interpret it.

Can you interpret it?

By Mr. Lawson: No.

By the Court: Ask the witness to come in.

(Thereupon the witness returns to the court room.)

By the Court: Ask him about it in the absence of the jury.

By Mr. Gerber:

Q. Do you know your wife's handwriting?

A. Yes, sir.

Q. I direct your attention to Defendant Munio Knoll's Exhibit marked 1, which is the letter, and 1-A, the envelope, for identification.

(Said document marked Defendant Munio Knoll's Exhibit 1 and 1-A for identification.)

By Mr. Gerber:

264 Q. Right now I ask you merely to look at it and tell us by looking at the handwriting whether that is her handwriting?

A. Yes, sir.

Q. Is that your wife's handwriting?

A. Yes.

Q. Is that her signature at the bottom of it?

A. Yes, sir.

Q. Do you know of any letter that she wrote to Munio Knoll during the month of October, 1948?

A. I don't know.

Q. I ask you to look at Defendant Munio Knoll's Exhibits marked 1 and 1-A for identification.

Do you read German?

A. I do.

Q. And ask you to read these and tell us whether you ever saw this letter, or whether you were present when it was written, or asked it to be written.

By the Witness: Since this letter has been brought out, your Honor, can I bring this issue up freely?

By the Court: Yes.

265 By the Witness:

A. We were very bitterly hurt by Mr. Romankiewicz. Mr. William Knoll, who is a first cousin of my wife, tried to entrust to him a lot of merchandise which he has plundered away from us, and we were very bitter and left very destitute. May I read the letter that the wife wrote?

By Mr. Downing: Just a moment on that. He has a letter, I believe. Is that the letter you showed me last night?

By the Witness: That is right.

By Mr. Downing: He has a letter from some other people concerning transactions—

By the Witness: That has nothing to do, either.

By Mr. Downing: There is a transaction with Mr. Munio Knoll and Mr. Ludner. Now, that is in English. That is quite clear, but this whole proposition, your Honor, I submit that they have gone into and opened the door to something I have very carefully avoided for two or three reasons. First of all, I think we are going to be permitted, inasmuch as they have gone to the extent that they have, to go to 266 some of the conversations, the rest of the conversations that this man has had with Regina Treitler and Munio Knoll about this entire transaction. Now, there has been characterizations made by Regina Treitler at some of these conferences or meetings that he has previously mentioned about this business relationship, characterizations by Regina Treitler or Munio Knoll about this entire business relationship, which I have studiously attempted to keep out of the case. I felt if the Government introduced that it would be prejudicial. There was name calling by all of them. I have attempted to avoid this whole issue, and it is a point I wanted to discuss some time ago out of the presence of the jury. Now, I submit, your Honor, if this thing proceeds, if they continue, that even on the state of the record at the present time, we probably have a right to go into the rest of the conversations about all these business relations.

By Mr. Gerber: Does counsel want me to refrain from showing blackmail? He is telling me if I persist he will do something. I think it is my duty to call it to your attention.

267 By the Court: It may be your duty, but you lawyers must think about it before a jury.

By Mr. Sokol: If the Court please, I would like to say something in connection with what Mr. Eben has suggested. I cannot readily agree at this stage that anyone can take the position, because this letter has been used to question this witness, that the door has been thrown wide open to anything, which Mr. Downing has chosen to keep out. Now, we are still confronted with the materiality. Merely because he has stated that certain facts, or something would not be proper for the Government to introduce, does not mean that Mr. Gerber is trying to shut the door. There have been some preliminary questions, and from those questions it is inferred why he did certain things. Now, what Mr. Gerber

is intending to show now, there was some attempt made to blackmail, if you please, or extort some money. Now, that has nothing whatever to do with what Mr. Downing has alluded to as conversations with Mrs. Treidler. It is collateral, and it has nothing to do with this matter.

By Mr. Gerber: Your Honor, may I say one thing further, in brief?

268 Your Honor, I am prepared to show—your Honor has stopped me now—but I will do it on my own case, if I have to, I am prepared to show that my client loaned him many thousands of dollars, and there was a business relationship, but this man ultimately sold out, and I have got all the documents which will show that, your Honor, and at the proper time, I will do it, your Honor, but this has to do with something else. This has to do with the credibility of the witness.

By Mr. Downing: It doesn't have to do with the credibility of this witness. The witness wants to say something to the Court.

By the Court: Go ahead.

By the Witness. Right now, the way things have gone, it seems to me I need counsel.

By the Court: Oh, no.

By the Witness: I don't need counsel, your Honor?

By the Court: No.

By the Witness: Because I have enough to talk about because you may infer I am trying to implicate these people.

269 By the Court: Wait a minute. Listen to me.

By the Witness: Yes, your Honor.

By the Court: All you have got to do is be cool, calm and collected and listen to the questions put to you and answer fully and freely and honestly, and nothing else, and you won't have any trouble.

By the Witness: Your Honor, may I ask one more question, because one of the attorneys has mentioned before a very insulting remark. He put a question to me, I don't remember exactly which of the gentlemen did it. I had no counsel to object.

By the Court: Well, you said it didn't happen, and I believe it. Sit down.

Now, that letter has nothing to do with this case unless you prove that this man knew it was going to be sent. Now, ask him that question.

By Mr. Gerber: I did ask him that question.

By the Court: No, you did not.

By Mr. Gerber: I asked him if he knew his wife had communicated with the defendant Munio Knoll.

By the Court: No, the question you asked him, if he knew that letter was going to be written.

270 By Mr. Gerber: Do you want me to ask the question?

By the Court: Yes, if you want to. If you don't want to, we will proceed.

By Mr. Gerber: No, I didn't mean that.

Q. Referring again to the exhibit of Munio Knoll, marked 1 and 1-A, respectively, for identification, I ask you, did you know that this letter was sent to him?

A. I didn't know.

Q. Did you know it was going to be sent to him?

A. I did not.

Q. Did you have any conversations with your wife relative to the sending of such a letter to him?

By the Court: Before it was sent.

By the Witness: No.

By Mr. Downing: I think that exhausts that subject, your Honor.

By the Court: That is all there is to it.

By Mr. Gerber: Isn't it proper for me to ask if she ever discussed this letter with him?

By Mr. Downing: Objection.

By the Court: No, I don't care about that.

By Mr. Gerber: May I ask this?

By Mr. Downing: Objection to any more questions
271 about this letter.

By Mr. Gerber: As a matter of convenience, counsel, I may want to subpoena the wife. May I now ask him where I can find her?

By Mr. Downing: Oh, no.

By the Court: No. Bring in the jury.

(The following proceedings were had in the presence and hearing of the jury:)

By Mr. Gerber: I have only one more question, your Honor.

By Mr. Gerber:

Q. At the time, Mr. Ludmer, that you went to the immigration office as you testified, your business relationship had terminated with Munio Knoll then, is that right?

A. Yes, sir.

By Mr. Downing: Objection, your Honor.

By the Court: Sustained. I told you to take up some other subject.

By Mr. Gerber: I am leading up to my question.

Q. You were bitter against—

By Mr. Downing: Objection, your Honor.

By the Court: Sustained.

272 By Mr. Downing: I ask that he be cautioned not to go into that matter again.

By Mr. Gerber:

Q. Were you friendly—

By the Court: Sustained.

By Mr. Gerber: That is all.

By the Court: Any further questions?

By Mr. Sokol: No further questions.

By Mr. Downing: Just one or two questions, Mr. Ludmer.

Redirect Examination by Mr. Downing.

Q. I believe on cross examination you mentioned the fact that at this Regina Treitler's apartment, when you previously mentioned Regina Treitler and Munio and Marcel were there and Marcel had an argument. I don't believe you did tell us what was said by Marcel at that time. Will you tell us what Marcel said at that particular time in Regina Treitler's apartment?

A. When Marcel came into Regina's house—

By Mr. Eben: It is understood this is subject to the running objection, so far as Léopold Knoll is concerned.

By the Court: Yes.

273 By the Witness:

A. They immediately opened up the argument.

By Mr. Downing:

Q. Tell us what Marcel said, and what anybody else said, about what Marcel said.

A. There were first insults thrown against one another.

Q. Tell us about this matter that was discussed at that particular time.

By Mr. Sokol: Your Honor, that is repetition. He has already answered the question.

By the Court: No, he has not. He did not tell about Marcel saying anything.

By Mr. Downing:

Q. Did Marcel say anything about this matter you previously testified that was discussed between Munio and Regina at that place?

A. Marcel entered the conversation only when it was opened up after Munio Knoll showed up.

Q. Did Marcel have anything to say about that matter in your presence at that time?

A. No.

By Mr. Downing: I believe that is all.

By Mr. Sokol: That is all.

274 By Mr. Eben: No recross.

By the Court: You may step down.

(Witness excused).

• • •

494

United States of America
vs.

Munio Knoll alias Zygmunt Roman-
kiewicz, Marcel M. Lutwak, Regina
Treitler, Leopold Knoll, and Grace
Klemtner alias Grace Klemtner Knoll

50 CR 464

Chicago, Illinois,
January 11, 1951,

10:10 o'clock a.m.

Met pursuant to adjournment.

Present:

Mr. Downing

Mr. Owen

Mr. Gerber

Mr. Bartoline

Mr. Sokol

Mr. Eben

Mr. Watt

Mr. Weissbourd

And thereupon the following further proceedings were
had herein:—

506 By Mr. Downing: Jane Turner.

JANE TURNER, called as a witness, on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Downing.

Q. Will you state your name, please?

A. Jane Turner.

Q. What is your address, Miss Turner?

A. 116-1/2 South Bonnie Brae, Los Angeles.

Q. What is your occupation?

A. I am a student.

Q. Where are you a student?

A. Los Angeles City College.

Q. Do you know the defendant Leopold Knoll?

A. Yes, I do.

Q. Do you see him in the court room?

A. Yes, I do.

By Mr. Dowling: May the record show the witness has identified the defendant Leopold Knoll in the court room.

Q. When did you first meet Leopold Knoll, approximately when, as best you recall?

507 A. In December of 1947.

Q. Where?

A. In New York.

Q. Who else was present?

A. Mrs. Knoll and Mr. Lutwak and I suppose Mr. Knoll's brother.

Q. Do you recall, was that Munio Knoll or Zygmunt Romankiewicz?

A. Yes.

By Mr. Gerber: I object to that because she said she supposes. I ask that be stricken.

By the Court: She now said "Yes". Motion denied.
By Mr. Downing:

Q. With respect to the person identified as Mrs. Knoll, was she formerly known as Grace Klemtner to you?

A. Yes.

Q. With respect to Grace Klemtner, when did you first meet her?

A. In 1945.

Q. Where at?

A. In Florida.

Q. Were you in the United States Army with her
508 at that time?

A. Yes, I was.

Q. Subsequent to that date and after you were discharged from the United States Army, did you commence to reside with Grace Klemtner?

A. Excuse me. I made a mistake on that date. It was in 1943.

Q. 1943?

A. Yes.

By Mr. Downing: Will you read that question again, Mr. Reporter?

(The following question was read by the Reporter:

"Q. Subsequent to that date and after you were discharged from the United States Army, did you commence to reside with Grace Klemtner?")

By the Witness:

A. Yes.

By Mr. Downing:

Q. Where at?

A. In Chicago.

Q. What was the address?

A. 2501 North Avers.

Q. In whose home was that?

509 A. Her mother's.

Q. From approximately what date and until approximately what date did you reside at that residence?

A. I lived there from 1945 to—1946 until 1947.

Q. Approximately what portion of the year 1947 did you last reside at that address?

A. In December.

Q. To your knowledge, did Grace Klemtner go to Paris, France?

A. Yes, she did.

Q. Approximately when, as best you recall?

A. In December of 1947.

Q. And what was the day of the week, do you recall that?

A. No, I don't.

Q. Do you recall approximately what time of the day she left?

A. She left in the evening.

Q. And from where did she leave?

A. From the airport.

Q. That is the Chicago Municipal Airport?

A. Yes.

Q. Did you see her board the plane and the plane depart from the Chicago Municipal Airport at that time 510 and place?

A. Yes, I did.

Q. And thereafter, when did you next see Grace Klemtner?

A. I saw her in New York when she returned.

Q. That is the meeting you have previously referred to, is that right?

A. Yes.

Q. And at that time the people you mentioned were present when you next saw her, is that right?

A. Yes.

Q. Did you have any conversation with the persons that you have identified at the time you next saw Grace Klemtner?

A. Only with Grace.

Q. Were the other persons present at that time?

A. Yes, but they didn't speak English.

Q. What was said at that particular time?

By Mr. Eben: Objected to, on the basis of what the witness said. They cannot give any conversation, even though in their presence, if in fact they did not speak English and did not understand English.

By Mr. Downing: There is no basis for saying they 511 did not understand English. All she said was that they did not speak English. That may be knowledge based upon some facts this witness has. On the other hand, there is no basis for saying the people did not understand English.

By Mr. Eben: That would be incumbent on the District Attorney to prove, and not upon us, particularly in view of the fact—

By Mr. Downing: The conversation was before these people, and is proper.

By Mr. Eben: It might have been in any one of many languages.

By Mr. Downing: That goes to its weight.

By Mr. Eben: It could not be admissible if they did not understand it, and there are a score of cases on that. I cite Territory vs. Big Knot On The Head.

By the Court: Don't get agitated. Just be calm, cool and collected, and let me think while you are talking.

By Mr. Eben: Certainly.

By the Court: Who was present at this time?

By the Witness: Mrs. Knoll and Leopold and his brother and Mr. Lutwak.

512 By the Court: By Mrs. Knoll, you mean whom?

By the Witness: Grace Klemtner.

By the Court: Step into the jury room, ladies and gentlemen.

(Whereupon the following proceedings were had out of the presence and hearing of the jury:)

By the Court: Let me hear what she is going to say, and then I can tell something more about it.

By Mr. Downing:

Q. Will you relate to the Court what conversation you had at that particular time and place?

A. It wasn't any momentous conversation. I asked if she enjoyed her trip, and I said, "How do you do?" to the people I was introduced to, and that is about all.

Q. She introduced you to the people at that time, is that right?

A. Yes, she did.

Q. Did she identify the persons, as to who they were?

A. No, just by name.

By Mr. Downing: I will withdraw the question. There is not enough to the question.

By the Court: Very well. Is there any other question likely to come up?

By Mr. Downing: No.

By the Court: Very well. Bring in the jury.

(Whereupon the following proceedings were had in the presence and hearing of the jury:)

By the Court: You may proceed.

Ladies and gentlemen, the pending question was withdrawn.

By Mr. Downing:

Q. After meeting this group in New York at the airport, where did you then go?

A. I went to the Governor Clinton Hotel.

Q. With whom did you go?

A. With Grace.

Q. Was that the Governor Clinton Hotel in New York City?

A. Yes.

Q. How long did you stay at the Governor Clinton Hotel?

A. Approximately three days.

Q. That is, after you met this group?

A. Yes, sir.

Q. By the way, where did you meet them in New York?

A. At the airport.

514 Q. Was that the La Guardia airport?

A. Yes.

Q. While you were at the Governor Clinton Hotel, who resided with you at that hotel?

By Mr. Eben: Objected to as being a matter that arose after the alleged conspiracy had terminated, upon their arrival in New York.

By the Court: Overruled. She may answer.
By the Witness:

A. Grace stayed with me at the hotel in New York.

By Mr. Downing:

Q. That is Grace Klemtner, is that right?

A. Yes.

By Mr. Eben: May I also have a running objection to the balance of the testimony occurring after the arrival in New York?

By the Court: Yes.

By Mr. Downing:

Q. After you left the Governor Clinton Hotel in New York, where did you go?

A. To Chicago.

Q. With whom did you go?

A. With Mrs. Knoll.

Q. That is Grace—

515 A. Yes.

Q. Grace Klemtner?

A. Yes.

Q. How did you come to Chicago?

A. By train.

Q. Who paid for the transportation to Chicago?

A. I did.

Q. Did Leopold Knoll reside at the Governor Clinton Hotel with Grace and you at that time that you resided there?

A. No.

By Mr. Eben: Objected to as immaterial.

By the Court: Overruled.

By Mr. Downing:

Q. Did Leopold Knoll accompany you from New York to Chicago at the time you came to Chicago with Grace Klemtner?

A. No, sir.

Q. How long did you remain in Chicago at that time?

A. Just one day.

Q. With whom did you reside in Chicago?

A. I stayed at a friend's house.

Q. Who stayed with you?

A. Grace.

516 Q. Where, do you recall approximately where the friend's house was located?

A. On Grand avenue and Wabash.

Q. Did Leopold Knoll stay there at that time?

A. No, sir.

Q. Thereafter, where did you go?

A. To Los Angeles.

Q. And with whom did you go?

A. With Mrs. Knoll.

Q. That is, Grace Klemtner?

A. Yes.

Q. And approximately what date was that that you went to Los Angeles?

A. About the 11th or 12th of December, 1947.

Q. This was in 1947?

A. Yes.

Q. Who paid for the transportation to Los Angeles?

A. I did.

Q. Did Leopold Knoll accompany you to Los Angeles?

A. No.

Q. Did you thereafter commence to reside in Los Angeles?

A. Yes.

Q. And with whom?

517 A. Mrs. Knoll.

Q. And where in Los Angeles did you reside?

A. We had two apartments.

Q. Do you recall the addresses, and how long did you stay at each of them?

A. 4358 Sixth avenue, for about ten months; and the Bonnie Brae address.

Q. That is the one at 1161 1/2 Bonnie Brae?

A. Yes.

Q. At both places, did Grace Klemtner reside with you?

A. Yes.

Q. Under what name did she live at that place?

A. She lived under the name of Klemtner, but she received mail under both names.

Q. She lived under the name of Grace Klemtner, but she received mail under the name of Grace Klemtner and what other name?

A. Mrs. Knoll.

Q. Mrs. Knoll. Has Grace Klemtner resided with you in Los Angeles from December, 1947, up until the present time?

A. Yes.

Q. Has Leopold Knoll ever resided with you and 518 Grace Klemtner at those addresses in Los Angeles?

A. No, sir.

By Mr. Downing: You may cross examine.

By Mr. Sokol: No cross examination.

Cross Examination by Mr. Eben.

Q. Miss Turner, when you met Mrs. Knoll and her husband, Leopold Knoll, in New York, he was sick, wasn't he?

By Mr. Downing: Objection, your Honor, as to how she could tell whether he was sick.

By the Court: She may answer.

By the Witness:

A. Grace told me that he was ill.

By Mr. Eben:

Q. He had a bad leg, isn't that right?

A. Yes.

Q. And at that time he needed hospital or doctor's care in connection with that leg, didn't he?

By Mr. Downing: Objection, your Honor. I think that is beyond—

By the Court: She may answer, if she knows.

By the Witness:

A. Grace discussed with me that he did need—

519 By Mr. Eben: Excuse me—

By Mr. Downing: I object to any discussion between Grace—

By the Court: All you know about it is what Grace told you?

By the Witness: Yes, sir.

By the Court: Sustained.

By Mr. Eben:

Q. After you went to California, Mrs. Knoll received letters from Mr. Knoll, didn't she?

A. Yes.

Q. And she received money from him from time to time, didn't she?

A. Yes.

By Mr. Eben: That is all.

By Mr. Downing: No redirect examination.

That is all: You may step down.

(Witness excused).

520 By Mr. Downing: Mrs. Wicker.

NETTIE WICKER, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Downing.

Q. State your name, please.

A. Mrs. Louis Wicker.

By the Court: Your name.

By the Witness: Nettie.

By the Court: Nettie Wicker?

By the Witness: Yes, sir.

By Mr. Downing:

Q. What is your address, Madam?

A. 6070 Stony Island.

Q. Chicago, Illinois?

A. Yes, sir.

Q. Do you have any occupation or are you a housewife?

A. Housewife.

Q. Are you acquainted with the defendant Zygmunt Romankiewicz?

521 A. Yes, sir.

Q. Are you acquainted with the defendant Regina Treitler?

A. Slightly.

Q. Do you see them in the court room?

A. Yes, sir.

By Mr. Downing: May the record show the witness has identified the defendant Zygmunt Romankiewicz and the defendant Regina Treitler in the court room.

By Mr. Downing:

Q. Directing your attention to the property at 3345 West Maypole Street in Chicago, do you and your husband own the property there?

A. Yes, sir.

Q. Did you ever talk to the defendant Regina Treitler regarding the renting of an apartment at that address?

A. Yes, sir.

Q. Approximately when as best you recall?

A. About Christmas of 1947.

Q. Christmas of 1947?

A. Yes, sir.

Q. And thereafter did you show the apartment to 522 the defendant Regina Treitler?

A. Yes, sir.

Q. Who else was along at that time, as you recall?

A. Maria Lutwak and Zygmunt, and I believe Marcel, and there were quite a few people, but I don't recall now.

Q. There was Maria and Zygmunt and Marcel, is that right?

A. Yes.

By the Court: Maria who?

By the Witness: Maria Lutwak.

By the Court: And who else?

By the Witness: And Zygmunt.

By Mr. Downing: Zygmunt.

By the Court: And who else?

By the Witness: Marcel.

By Mr. Downing:

Q. Was Mrs. Treitler there?

A. Yes.

Q. And was that on the same day that you had talked to Mrs. Treitler about renting the apartment, around Christmas of 1947?

A. Yes, I believe she called me up a few hours earlier.

523 Q. And did the people take the apartment at that residence at that time?

A. Yes, sir.

Q. What floor was this apartment located on?

A. Third floor front.

Q. What was the size of the apartment?

A. Three-room apartment.

Q. Will you describe what type of rooms they were?

A: ~~Yes~~. Large bed room, a large living room, kitchen and bath room.

Q. And to your knowledge after the people rented the apartment, who lived there?

A. Well, I used to come up during the day, I would see Maria there, I would also see Marcel and Zygmunt.

Q. Zygmunt, and did you see Marcel and Maria?

By Mr. Eben: I would like to interpose an objection on behalf of my client Leopold Knoll that any acts or declarations that presumably will come from this witness would not be admissible against him on the grounds, first, that he is not bound by them and, secondly, that it was after the arrival here in this country.

524 On the first ground it seems clear to me he ought not be bound by anything done by the others, at this stage in any event.

By the Court: What do you say?

By Mr. Downing: I submit, your Honor, that it is admissible against all of them at this stage of the evidence. Certainly acts and declarations of one are admissible against the others. I think there is sufficient evidence in here, in view of the record to date, and it is admissible against all of them.

Three of them were there when they went to rent the place, Marcel, Munio and Mrs. Treitler were there when they went to rent it.

By Mr. Eben: Not Leopold.

By Mr. Downing: There was a group there when they went there.

By Mr. Eben: I don't care if they had an army, if Leopold was not there.

By Mr. Downing: At this time this is admissible against all of them.

By the Court: Step into the jury room, will you, please, Ladies and Gentlemen?

525 (Whereupon the following proceedings were had out of the presence and hearing of the jury:)

By the Court: Does anybody have a transcript of the testimony of Anne Zapler here?

By Mr. Downing: Yes, your Honor, I have it.

By the Court: May I see it?

By Mr. Downing: Yes. (Handing transcript to the court.)

By the Court: What is the present question, and the objection?

(The desired portion of the record was read by the reporter.)

By the Court: Objection overruled.

Bring in the jury.

I think on the present state of the record the testimony of Mrs. Zapler is admissible against all of the defendants. That will be the ruling.

By Mr. Downing: Will the jury be so informed?

By the Court: The jury will be so instructed. Bring in the jury.

526 (Whereupon the following proceedings were had in the presence and hearing of the jury:)

By the Court: Ladies and Gentlemen, when the witness Anne Zapler was on the stand she was the first witness who testified.

She testified to certain conversations with Mrs. Treitler, and certain conversations with Marcel Max Lutwak.

At that time I admitted the conversations which the witness Anne Zapler had with Regina Treitler as against Regina Treitler only, and I admitted the conversations which the witness Zapler had with Marcel Max Lutwak against Max Lutwak only.

Upon the present state of the record I think, and I rule, that those conversations were admissible and shall be received and considered by you as against all of the defendants.

The present objection is overruled.

Proceed.

By Mr. Gerber: May I note exception to that ruling
527 in the record, on behalf of Munio Knoll?

By the Court: Yes.

By Mr. Downing:

Q. At the time you met Maria what was the last name that she was introduced to you as?

A. Mrs. Lutwak.

528 Q. Who paid the rent at this apartment?

A. Mrs. Lutwak.

Q. How long did she pay the rent?

A. About two months.

Q. Thereafter, who paid the rent?

A. Zygmunt Romankiewicz took the apartment. He was going to pay the rent.

By Mr. Eben: For the purpose of protecting my record, your Honor, I would like the record to show I have a continuous objection.

By the Court: Very well.

By Mr. Eben: To these acts, declarations and conversations.

By the Court: Objection overruled.

By Mr. Eben: Thank you.

By Mr. Downing:

Q. Thereafter, if you know, did Zygmunt Romankiewicz live at this residence as long as they have rented the property from you?

A. Yes, sir.

Q. Until what date was that approximately?

A. About April of 1949.

Q. April of 1949?

A. Yes, sir.

529 Q. Thereafter, if you know, where did the defendant Zygmunt Romankiewicz reside?

A. On East 61st Street.

Q. At what address?

A. 1500 East 61st Street.

Q. Approximately how long did he reside at that address as best you can recall?

A. A few months.

Q. Do you know where he resides at the present time?

A. 6068 Stony Island Avenue.

Q. Approximately what date did he commence to reside at that address?

A. I don't remember.

Q. Would you say—Pardon me, were you going to say something?

A. I would say about the summer of 1949.

Q. The summer of 1949?

A. Yes.

Q. Do you own that property, you and your husband own that property?

A. Yes, sir.

Q. And he is still residing there, is he?

A. Yes, sir.

530 Q. Is he employed by Mr. Wicker and yourself?

A. Yes, sir.

Q. Approximately how long has he been employed by Mr. Wicker and yourself?

A. About a year and a half, I would say.

Q. What is the nature of his duties at the present time?

A. Well, he works as an all around man and manages the property.

Q. Now directing your attention to the summer of 1948, were you at South Haven, Michigan?

A. Yes, sir.

Q. Did the defendant Zygmunt Romankiewicz in company with others visit your place at that particular location?

A. Yes, sir.

Q. With whom was he at that time?

A. With Maria.

Q. That is the Maria you have previously identified?

A. Yes, sir.

Q. Who else, if you recall?

A. Another couple, friends of theirs.

Q. Do you recall their names?

A. Weisman.

531 Q. Is that David Weisman?

A. I don't know the first name.

Q. Did the defendant Zygmunt Romankiewicz and Maria remain overnight at your home there?

A. Yes, sir.

Q. Did they share the same room together while they slept?

A. Yes, sir.

Q. I now show you a document which is identified as Government's Exhibit 25 marked for identification and I ask you to look at that, and ask you if you have seen that before.

A. Yes, sir.

Q. With respect to this photograph, I ask you if your picture is included in that group?

A. Yes, sir.

Q. Do you know where that was taken?

A. At the Sherman.

Q. At the Hotel Sherman here in Chicago?

A. Yes, sir.

Q. Do you recall approximately when that was?

A. No, I cannot remember.

By Mr. Downing: You may cross examine.

532 By Mr. Eben: No cross examination, on behalf of my client.

By Mr. Sokol: No cross examination, if the Court please.

By Mr. Gerber: No cross, your Honor.

By Mr. Bartoline: I just want to ask one or two questions.

Cross Examination by Mr. Bartoline.

Q. When did Maria leave the apartment on Maypole Avenue, do you know?

A. I cannot remember, but when Mr. Romankiewicz called me and told me he had taken the apartment, Maria left.

Q. Do you know where she went?

A. No, he just said he was taking over the apartment, and there was nobody there but himself.

By Mr. Bartoline: That is all.

Redirect Examination by Mr. Downing.

Q. Thereafter, did Maria return to that apartment?

By Mr. Gerber: Objected to as not proper redirect.

533 By the Court: Overruled.

By Mr. Downing:

Q. Do you recall, did Maria return thereafter?

A. Yes.

Q. Approximately when was that?

A. Oh, a few months later.

Q. Then approximately how long did she reside there at that apartment?

A. I don't remember. A short while.

Q. Was it a period of say three or four months?

A. It must have been two or three months.

By the Court: What is the answer?

By the Witness: Two or three months.

By the Court: Speak up.

By Mr. Downing: Speak up so that the jury can hear you please.

By Mr. Downing:

Q. Was she residing there at the time Maria and the defendant Zygmunt Romankiewicz and the Weismans came to your place at South Haven, Michigan, in the summer of 1948?

A. Yes, sir.

Q. It was after she had left the first time, is that right?

534 A. I think so.

Q. Can you recall that?

A. Yes, it was after.

Q. That was after she came back?

A. Yes.

Q. With respect to Government's Exhibit 25 marked for identification, was Maria present at the time this photograph was taken?

By Mr. Eben: That is objected to. It is obviously not redirect.

By the Court: I think it is in view of the cross. Overruled.

By Mr. Downing:

Q. Was this prior to the period of time that Maria had returned and was residing there the second time?

A. I don't remember.

Q. Well, to refresh your recollection, was this in about June of 1948?

A. Yes, about that.

Q. That then was the second time that Maria had resided there, is that right?

A. Yes, sir.

By the Court: What is the answer? Speak, Madam.

535 By the Witness: Yes, sir.

By Mr. Downing: That is all.

By Mr. Gerber: No cross.

By Mr. Eben: No cross.

By Mr. Downing: Thank you.

(Witness excused.)

GEORGE GROTHE, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Downing

Q. Will you state your name, please?

A. George Grothe.

Q. Your address?

A. 5801 North Mason Avenue, Chicago.

Q. What is your business or occupation, sir?

A. I am custodian of the records of the First National Bank, Chicago.

Q. How long have you been employed by The First National Bank, Chicago?

A. Twenty-six years.

Q. Just briefly, will you describe to the court and 536 jury the nature of your duties at the bank?

A. Well, I am connected with the auditing department of the bank, and in that capacity we have control of all records; after the current records are finished; we have control of the older records.

Q. So you are custodian of the records of The First National Bank, is that right, sir?

A. That is correct.

Q. Now, was The First National Bank of Chicago subpoenaed to produce certain records and signature cards of the defendant Marcel Max Lutwak, 1947, and their ledger sheets?

A. Yes, sir, they were.

Q. Do you have those with you?

A. I do.

By Mr. Downing: Will you mark this Government's Exhibit 20?

(Document so marked for identification.)

By Mr. Downing:

Q. Now, directing your attention to Government's Exhibit 20 and Government's Exhibit 21, each marked for identification, I ask you to look at those and ask you if those are the records you have produced in response to that subpoena?

A. Yes, they are.

Q. With respect to each of these records, Government's Exhibit's 20 and 21, marked for identification, are they the records of the First National Bank of Chicago?

A. Yes, sir, they are.

Q. Were those records prepared in the regular course of business at the bank?

A. They were.

Q. Was it the regular course of business of the bank to prepare such records at the time they were prepared?

A. What is that question?

By Mr. Downing: Read the question.

(Question read).

By The Witness:

A. Yes.

By Mr. Downing:

Q. Are these records in your custody at the First 538 National Bank of Chicago at the present time?

A. Yes, sir, they are.

Q. Now, directing your attention to Government's Exhibit 21, will you explain to the Court and jury by whom that was prepared?

A. This is a transcript of the account of Marcel M. Lutwak for the months of October, November and December, 1947, and they were prepared by me from a microfilm.

Q. Does the microfilm contain the microfilm of the original ledger sheet of that account?

A. Yes, sir.

Q. Did you personally withdraw the data which is contained in that exhibit, or did you have Government's Exhibit 21, will you explain to the Court and jury by whom

A. I did.

Q. And is Government's Exhibit 21 marked for identification a true and correct transcript of the microfilm, the original of the ledger sheet of Marcel M. Lutwak?

A. Yes, it is.

Q. With respect to Government's Exhibit 20, marked for identification, will you explain briefly to the Court and jury what that document is?

539 A. It is the signature card of Marcel M. Lutwak.

Q. Was that document received in the regular course of business at the First National Bank of Chicago?

A. Yes, sir, it was.

By Mr. Downing: If your Honor please, at this time, I would like to offer in evidence Government's Exhibits 20 and 21, marked for identification, and ask leave of court to substitute a photostatic copy of Government's Exhibit 20 and return the original to the witness.

By Mr. Eben: I have no objection to any substitution of a photostat, but I do object to either of these exhibits, and I am referring to Government's Exhibits 20 and 21 for identification as being inadmissible against Leopold Knoll, on the ground that I stated before, that the acts and declarations of Lutwak are not admissible against him. That is, in connection with the conspiracy, there is nothing shown.

I am not inclined to make any objection, however, on the ground of the genuineness of Government's Exhibit 21, although it appears that it is objectionable without bringing in the original photostats or microfilm.

540 By Mr. Downing: Of course, we can't bring in the film and the shadow box.

By Mr. Eben: I have no objection on that score.

By Mr. Gerber: I would like to make the same objection on behalf of Munio Knell, your Honor.

By Mr. Sokol: I do not care to make any specific objection, your Honor, but I want to make certain, on behalf of Regina Treitler, that any objections made with respect to the materiality and admissibility that are made by other defendants may be considered as made on behalf of my client.

By The Court: You had better indicate your objection, then.

By Mr. Sokol: Very well. I make a similar objection.

Mr. Bartoline: I won't object to these.

By The Court: Let me see them: What is the materiality?

By Mr. Downing: If your Honor please, there are withdrawals on that ledger sheet, two withdrawals, in the amount of \$1,000, one dated October 30th, and the other dated November 17th, 1947. The exhibit, 14, which is Government's Exhibit 14, one of the transcripts which 541 was admitted yesterday in the record, in there, there is a statement by the defendant Munio Knell about the payment of \$1,000.

By Mr. Eben: It strikes me, your Honor, it is improper to discuss this matter in the presence of the jury.

By Mr. Gerber: I object to this statement, your Honor, in the presence of the jury.

By The Court: Step in the jury room, ladies and gentlemen.

(The following proceedings were had out of the presence and hearing of the jury:)

By The Court: Now, what is it? Tell me.

By Mr. Downing: If your Honor please, there are two \$1,000 disbursements in the ledger.

By The Court: Yes.

By Mr. Downing: October 30th, which is two days before the defendant Grace Klemtner went to Paris, and

November 17th, there is a disbursement of a thousand dollars. There is an indication in the transcript of the testimony taken at the Immigration Department of Munio Knoll, in which he indicated in November of 1947 he, Marcel Max Lutwak and Bess Osborne, met in a restaurant in Chicago, at the Admiral Restaurant, and Marcel gave to Bess a check for \$1,000.

By The Court: In the statement of whom?

By Mr. Downing: Munio Knoll. There is a statement that he, Marcel Lutwak and Bess Osborne, some time in November, 1947, met at the Admiral Restaurant in Chicago, and that Marcel handed Bess a check in the amount of \$1,000. In the statement of Marcel Lutwak, there is likewise testimony that he, Munio Knoll and Bess Osborne, met at the Admiral Restaurant in Chicago, and that he prepared a check on his account at the First National Bank in Chicago in the amount of a thousand dollars, and handed it to Bess Osborne at that particular time.

By Mr. Bartoline: He said he gave it to Mrs. Knoll.

By Mr. Downing: No, he said he gave it to Bess Osborne.

By The Court: Who said he gave it to Bess Osborne?

By Mr. Downing: Marcel Lutwak said and Munio Knoll both said it in separate statements.

543 By Mr. Sokol: Of course, as the record presently stands, we don't know which questions and answers Mr. Downing wants to put in from these statements. He has already indicated he is going to segregate some of them.

By The Court: He said he might leave out some questions, but the statements are in evidence.

By The Court: Take a few minutes recess, gentlemen. (Recess taken).

By The Court: Bring in the jury.

(The following proceedings were had in the presence and hearing of the jury.)

By Mr. Eben: I thought there was to be no further argument in connection with this matter.

By The Court: No, I do not need any further argument.

The objections to Government's Exhibit 20 for identification and Government's Exhibit 21 for identification will be overruled and they may be received.

(Said documents, so offered and received in evidence, were marked Government's Exhibits 20 and 21.)

544 By Mr. Downing: May we have leave to substitute photostats?

By The Court: Yes. I understand there is no objection to the Government substituting a photostat.

By Mr. Sokol: No objection.

By Mr. Downing: If your Honor please, Mr. Bartoline, on behalf of Marcel Lutwak, and myself, have agreed to a stipulation that the signature on Government's Exhibit 20, the authorized signature, is the signature of Marcel M. Lutwak. Is that right?

By Mr. Bartoline: Yes.

By the Court: If that stipulation is to be admissible against the other defendants, they will have to join in it.

By Mr. Eben: Show it to Marcel. If he says it is his signature, I will certainly say it is. Without prejudice to my objection to the exhibit, I will say that it is Marcel's signature.

By Mr. Gerber: That is my position, too, as to Munio Knoll.

By Mr. Sokol: The same as to Regina Treitler.

By Mr. Downing: Is there any cross examination of this witness?

545 By Mr. Sokol: No cross.

By Mr. Downing: Thank you.

(Witness excused).

MORRIS HABERMAN, called as a witness herein on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Downing.

Q. Will you state your name, please?

A. Morris Haberman.

Q. How do you spell your last name?

A. H-a-b-e-r-m-a-n.

By The Court: M-o-r-r-i-s?

By The Witness: That is correct.

By Mr. Downing:

Q. What is your address, Mr. Haberman?

A. My address is Morristown, New Jersey.

Q. What is your business or occupation, sir?

A. I am a furrier, in business for myself.

Q. And do you have your business in the same town that you previously mentioned?

A. The same town, Morristown.

By The Court: What is the town?

By the Witness: Morristown, New Jersey.

By Mr. Downing:

Q. How long have you been in the fur business, approximately how long?

547 A. For myself?

Q. Yes, entirely?

A. Entirely?

Q. Yes.

A. I am in the fur trade since 1923.

Q. How long have you been for yourself?

A. Fifteen years.

Q. Are you acquainted with the defendants Munio Knoll, Marcel Max Lutwak and Regina Treitler?

A. I am.

Q. Do you see them in the court room?

A. Yes.

Q. Will you point them out, please?

A. They are sitting at that table next to each other.

By Mr. Downing: Let the record show that the witness identifies the defendants Munio Knoll, Marcel Max Lutwak and Regina Treitler.

By Mr. Downing:

Q. Calling your attention to the defendants Munio Knoll and Marcel Lutwak, when did you first meet them?

A. It was at the end of November, 1947.

Q. Where?

A. In the hotel—it is on 46th Street. For the
548 moment the name escapes me.

Q. Is it in New York?

A. New York City. It is between 6th and 7th Avenue, on 46th Street in New York City.

Q. To refresh your recollection—

A. Century, I believe.

Q. Century Hotel?

A. Yes.

Q. Who introduced you to the defendants?

A. Mr. and Mrs. David Weissman.

Q. Who else was present at that time?

A. My wife.

Q. Did you have a conversation at that time and place regarding the defendants Munio Knoll and Marcel Lutwak?

A. Yes.

Q. Will you relate in substance what the conversation was—

By Mr. Sokol: Objection.

By Mr. Downing:

Q. —stating who said what?

By Mr. Eben: Same objection, of course, to Leopold Knoll, my objection being—

By The Court: Who were there?

549 By the Witness: Mr. Munio Knoll, Mr. Marcel Lutwak and Mr. David Weissmann, Mrs. Blanche Weissmann, my wife Eleanor, and myself.

By the Court: Mr. Munio Knoll and Mr. Marcel Lutwak, is that right?

By Mr. Downing: Yes.

By The Court: When was this?

By Mr. Downing: November, 1947, he said.

By The Court: What the witness proposes to say would be admissible, if it is relevant and material, as against Munio Knoll and Marcel Lutwak, and it will be received as against them, if it is relevant and material, only until I hear what it is.

By Mr. Downing: Yes, your Honor. All right.

By Mr. Downing:

Q. Will you relate the conversation as best you recall, sir?

A. Yes. We first spoke, and I mentioned to Mr. Knoll that I was quite surprised to hear from my friend Weissman that he had left Roumania comparatively recently, only a matter of two or three months ago, and was here in the United States so quickly, and Mr. Knoll said, "Yes," he says, "it went very fast."

By Mr. Eben: I want to make sure it is clear that this is Munio Knoll he is talking about.

By Mr. Downing: I think the record is clear on that.

By The Court: The record shows.

By Mr. Downing:

Q. Will you go ahead?

A. Yes. "Yes, it went very fast."

And I said to him, "I am very much interested to know how it goes."

He says, "Well, when you have the right connections and are willing to spend money you can pave your way very quickly.

We decided then, and he said, "Well, let us not talk about things like that. I am very hungry. You have come late. I expected you two hours earlier. Let's go out some place and have a good time."

We all, all six of us, went to some night club where we had dinner.

551 By Mr. Eben: I object to this portion as immaterial, in any event.

By The Court: Overruled.

By Mr. Downing:

Q. Did you have any further conversations?

A. Yes. And during the course of the evening I asked Mr. Knoll why he hadn't brought his wife Mania to New York, and that I had heard she was a very nice woman and a very good looking woman.

Mr. Knoll said that his wife would not leave the course that she was taking in English, and she wouldn't leave Chicago for any reason.

And then he took out from his wallet a picture and showed it to me, and we all passed it around the table, and that was the woman that I later met and knew as Mania Knoll.

At the table the discussion—my wife was discussing, having a few words with Mr. Lutwak—I don't mean to imply that they were any argument—just talking to him across the table, and she asked him whether he was married. Mr. Lutwak said, no, that he was single, and if she knew of a nice girl he would be very glad and interested to meet one.

That is about all that happened that evening.

552 Q. Did you say the photograph was shown, passed around to all of the people?

A. To all of them, yes.

There is one other thing that I recall. Mr. Munio turned to Marcel and—no, said to me, that that picture does not really do her justice, she is much better looking than that picture shows, and he turned to Marcel, "Am I not right?" And Marcel said, "Yes, she looks a lot better on the picture."

Q. Do you recall any other conversation at that time about that matter?

A. The only other conversation that we had was that we might—I mean that we made an appointment for Tuesday to meet again.

Q. Did you later see the person whose picture you saw at that particular time?

A. Yes.

Q. And by whom were you introduced to that person?

A. By Mr. and Mrs. David Weissman.

Q. Under what name were you introduced to her?

A. Mania Knoll.

Q. Who was present at that time?

A. Mr. and Mrs. Weissman and my wife.

Q. Where did you meet Mania Knoll?

553 A. In New York.

Q. Approximately when was that?

A. That was, as close as I can place it, it was about the third week in March.

Q. And this was in 1948?

A. 1948.

Q. Now, did you meet with them, Munio Knoll and Marcel Lutwak, again after this first discussion that you have just related?

A. Yes, we met on the following Tuesday. We first met on a Sunday, and that was the Tuesday after the Sunday.

Q. What part of the year was that?

A. I would place that at the very end of November or the very beginning of December.

Q. And this is in—

A. In 1947.

Q. Where did you meet the second time now?

A. We again met at the Century Hotel, and the room—

Q. Who was present at that time?

A. Well, Mr. and Mrs. Weissman, and my wife and I and Mr. Munio Knoll and Mr. Marcel Lutwak.

Q. All right. Did you have any conversation at that time about Leopold Knoll?

554 A. Not in the hotel.

Q. After you met these people at the hotel, did the group go some place?

A. Yes. We were joined by a Mr. David Frost, who was introduced to us by Mr. Munio Knoll as being a business man, an exporter and importer, and we all left together and we visited two, I believe two night clubs. One of them

I believe was the Latin Quarter.

555 Q. Did you have any conversation with the defendants Munio Knoll and Marcel Lutwak about defendant Leopold Knoll?

A. Yes.

By Mr. Eben: Objected to. Obviously, this might conceivably go along some sort of admission. It is, therefore, if I am correct in my prognostication, not admissible against Leopold Knoll, not having been made in furtherance or pursuance of the conspiracy. It is not an act or declaration, as I said, in furtherance of it; it will probably be a narrative of past events.

By the Court: What is your theory?

By Mr. Downing: Our theory, your Honor, from the evidence already of this witness, the conversations between Mareel and Munio and the previous testimony in this case, that these conversations are admissible as acts and declarations of one, equally admissible against all of these people.

By Mr. Eben: It must be in furtherance or pursuance of the conspiracy, assuming there was one.

556 By Mr. Downing: Yes. This was before—mentioning what it might be—but this is not a past event. This is about a coming event.

By The Court: Step into the jury room, ladies and gentlemen.

I am sorry to make you walk so much, but I would rather have you walk than walk myself.

(Whereupon the following proceedings were had out of the presence and hearing of the jury:)

By The Court: Do you remember the question, sir?

By The Witness: Yes.

By the Court: Will you answer it.

By the Witness: Mr. Munio Knoll told me the reason he was in New York was because he was expecting his brother from Europe, and Mr. Marcel Lutwak said he probably will arrive the following day and will be able to stay in Chicago. Then Mr. Munio Knoll said to me, "Well, you see how easy it is if you know how to come to the United States."

By Mr. Eben: Is that the full extent of it?

By The Witness: That is the full extent.

By The Court: Anything further from this witness?

557 By Mr. Downing: I have quite a bit. There is quite a bit more testimony.

By The Court: Is there anything else there will be question about?

By Mr. Downing: Just let me review my notes a minute.

By Mr. Sokol: I would want to object to this question, as well as the previous one, to which I have already objected.

By Mr. Downing: There is going to be quite a bit of testimony concerning acts and events that have taken place and conversations, principally with Munio Knoll, that is, after this particular conversation, principally with Munio Knoll, and one with the defendant Regina Treitler, which will carry us into 1948 quite a ways. But, as I say, it is after this conversation, principally, the conversations are with respect to conversations with Munio Knoll, at which, in most instances, no other defendant was present, that is, after this particular conversation.

By The Court: With respect to the others, do you contend they are admissible as against anybody other than Munio?

By Mr. Downing: I contend they are admissible against all of them.

By The Court: Because they are made during the continuance of the conspiracy?

By Mr. Downing: That is right.

By The Court: And in furtherance of it?

By Mr. Downing: And in furtherance of the conspiracy, your Honor.

By The Court: I suppose there will be an objection to every question.

By Mr. Sokol: We could not possibly know in advance.

By The Court: Do you want to go through with this witness and find out what the rulings are going to be? I cannot tell. You ask what was said and I haven't any idea what was said.

By Mr. Downing: I can state this, I can take the Court's time, it might take probably a half an hour or forty-five minutes before we complete it.

By the Court: It might be better than the jury running back and forth.

This conversation which the witness has just de-
559 tailed in the absence of the jury, I think is admissible,
telling how, as is apparent from it, Mr. Lutwak and
Mr.—

By Mr. Downing: Munio Knoll?

By the Court: Munio Knoll were there in New York
to meet—

By Mr. Eben: Leopold.

By the Court: —Leopold.

By Mr. Downing: And we have the testimony of Jane
Turner that they were there and did meet Leopold.

By Mr. Eben: I think the part of it—

By the Court: So, I think it is admissible.

By Mr. Eben: The part of it about being in New York
might be admissible, but any statement as to how easy it
is to come in is a statement against interest.

By the Court: Of course it is.

By Mr. Eben: And is not admissible against co-con-
spirators because a statement against interest is not a
declaration or act in furtherance of the conspiracy.

By the Court: It may be. It may be. Any admission
may be in pursuance of the conspiracy. It is not just
560 excluded because it happens to be an admission.

By Mr. Sokol: As long as Mr. Downing has al-
luded to a good deal more testimony and other conversa-
tions, possibly as the Court indicated, the only way we
could save the question as far as the jury is concerned,
might be, with respect to each conversation, to take this
man over his testimony outside the presence of the jury
and give us an opportunity to make our objection in a
timely manner.

By Mr. Downing: If your Honor please, I will abide
by the Court's ruling, but I don't think it is necessary.
I think the rest of this testimony falls into the same
category that this testimony does.

By the Court: There comes a time when whether some-
thing is in furtherance of a conspiracy, is a question of
fact. The jury passes on it and not me. If it can be rea-
sonably regarded as made in pursuance of the conspiracy
and in furtherance of it, it is a question of fact. If under
no circumstances can it be reasonably contended that it is
made in furtherance of the conspiracy then I exclude it.

But now, after we have a world of testimony in
561 here about a conspiracy, there isn't any doubt about
it now.

By Mr. Eben: May I say this to your Honor, if your Honor has concluded, that it is not a question of fact. It is a question of law for the Court to decide.

By the Court: Why?

By Mr. Downing: No.

By Mr. Eben: As to whether an act or declaration is in pursuance or furtherance of a conspiracy. If your Honor does not decide it, then you have completely abolished the rule with respect to it, because in all events it would go to the jury as a question of fact. Then there will be no rule.

By the Court: No. A man is taken into a police station and makes a confession. Obviously—I suppose you might conjure up some sort of a conspiracy, where it might be made in furtherance of a conspiracy, but in the ordinary conspiracy that is not made in furtherance of it. He might do some equivocal act.

I have to instruct the jury, if it is not in furtherance of a conspiracy, that they do not have to regard it, even if it is in.

562 By Mr. Eben: That is where I differ. I say it is your job, and you say under these circumstances it is the jury's job.

By the Court: I venture to say that you will tender me an instruction, if you do your duty to your client, that the jury shall not consider any act that is not in furtherance of the conspiracy.

By Mr. Sokol: Under the present state of the record there is no immediate connection of each defendant with each and every other defendant.

By Mr. Downing: Oh—

By Mr. Sokol: Just a moment. Some of the testimony which has been alluded to by Mr. Downing may very well be properly objectionable, and we would have to once again immediately arise and object. All I am suggesting to the Court now is this, that you don't know and we don't know to what questions we will object.

By Mr. Eben: Thus far in the case, my observation is that practically everything the Government has shown thus far, by way of proving any type of conspiracy, has been admissions against interest or statements made from the witness stand by people who had conversations.

563 By the Court: By admissions against interest, you mean admissions—

By Mr. Gerber: Any kind of admission.

By the Court: Admission may be—

By Mr. Gerber: What I mean—

By the Court: An admission may be admissible against all parties to the conspiracy.

By Mr. Gerber: Thus far the Government witnesses testified to conversations with various people, with some present and some absent. That is the extent of it.

By the Witness: Your Honor—

By Mr. Gerber: Disconnected statements of people made to the witnesses outside the presence of certain defendants.

By the Court: I will just give you an illustration of a type of case you are not wholly unfamiliar with—prosecuting, I mean.

A man comes running into a plumbing shop and says, "Come over here to the barn, quick. We have a still over there, and it is about to blow up. Come over and help us a bit."

What do you think of that? Would that be admissible?

Suppose the charge is conspiracy in the operation of 564 the still.

By Mr. Gerber: What I am talking about is that everything is admissible so far by your ruling, subject to it being connected up and subject to the Government proving the conspiracy.

By the Court: I have gone as far as any Judge ever went to keep out any improper testimony against your clients, and if you don't know it, I think you do know it, but I don't want to go to absurd lengths.

By Mr. Watt: Your Honor—

By the Court: Bring in the jury.

(Whereupon the following proceedings were had in the presence and hearing of the jury:)

By Mr. Eben: Without deserting my position at all, and adhering fully to everything I said before during the course of the colloquy, your Honor indicated you would make some statement to the jury as to whether or not they would determine whether the declarations were made in pursuance of conspiracy. However, I am not requesting you to do it, because my view is contrary.

By the Court: I am not going to advocate the question

of whether it is admissible. I will decide whether it
565 is admissible. But finally, I will instruct the jury, if
I am requested.

Objection overruled. Proceed.

By Mr. Downing:

Q. We were talking about this meeting there, and the
last question concerned a conversation with the defendant
Munio Knoll and Marcel Lutwak and concerning Leopold
Knoll.

A. Yes.

566 Q. Will you relate the conversation?

A. Mr. Munio Knoll told me that the purpose for
his stay in New York was because he was expecting the
arrival of his brother Leopold, and Mr. Marcel Lutwak
remarked that they had been expecting him for two days
now, and he hadn't arrived, and if he did not arrive by to-
morrow, which would be Wednesday, he would have to go
back for business reasons to Chicago.

Q. Was there anything else said at that particular time
about that matter?

A. No. The only thing that was said is that when Mr.
Munio Knoll mentioned about his brother coming, he says,
"You see how easy it is to come to the United States if you
know how."

Q. Now directing your attention to Government's Ex-
hibit 22 marked for identification. I ask you to look at that
and ask if you have seen that before.

A. Yes, sir, I did.

Q. And I ask you where that photograph was taken.

A. I believe it was in the Latin Quarter in New York
City.

Q. Was that taken the night and at the place you men-
tioned you had this conversation where you went
567 after you met at the Century?

A. That was taken on the Tuesday of that week.

Q. In December, 1947?

A. Very early in December.

Q. Who all was present at that time the picture was
taken?

A. On my right here is Mrs. Weissman; Mr. Munio
Knoll—

By Mr. Owen: I object to what the photograph shows
until it is introduced in evidence.

By Mr. Downing: If your Honor please, I think he has a right to show, to identify the parties there.

By the Court: Yes. Maybe it is the hockey team. I don't know.

By Mr. Downing:

Q. Start all over again.

A. Mrs. Weissman, Munio Knoll, my wife, Mr. Weissman, Mr. Frost, David Frost, myself and Mr. Marcel Lutwak.

Q. Is that a true and correct photograph or picture that was taken at that particular time and place?

A. It is.

By the Court: Let me see it.

By Mr. Downing: Yes, your Honor.

568 By Mr. Downing:

Q. I ask you if you received this photograph Government's Exhibit 22 marked for identification on that evening and at that place.

A. That evening, yes, and that place.

Q. Directing your attention to February of 1948, did you have occasion to see the defendant Munio Knoll?

A. Yes, I did.

Q. Where?

A. Again in the Century Hotel.

Q. In New York City?

A. New York City.

Q. Who was present at that time, sir?

A. My wife, Mr. and Mrs. Weissman—

Q. And Munio Knoll, is that right?

A. And Munio Knoll, that is right.

Q. What happened at that time while you were there at the Century Hotel with the people you mentioned?

By Mr. Sokol: I object.

By Mr. Eben: Yes, I object too, based on the same grounds as I had to the last objection.

By the Court: Do you contend this is admissible
569 against everyone?

By Mr. Downing: That is right, your Honor.

By the Court: I don't know whether it is or not, until I hear it I cannot tell. I am not a mind reader.

By Mr. Downing: I submit it is material, your Honor, and I think we will connect it.

By the Court: Proceed.

By Mr. Downing:

Q. Will you relate what took place at that time and place?

A. Yes. We asked Mr. Knoll to come down to us to eat, and Mr. Knoll, Munio Knoll, said that he was expecting a very important telephone call from Chicago and that he would not leave the room until that call came through, unless it was towards the evening. And—I am trying to separate each day, you know.

Q. What else took place that day?

A. I asked him about his brother Leopold and he told me that his brother was or had been ill and in Florida and was recuperating there, and that it cost him a lot of money, that his brother had cost him a lot of money because he was paying for all this and also paid for all expenses for his coming over.

570 Q. Was there any other event that took place at that time, if you recall, or conversation?

A. Well, one event I recall—I mean I recall there being three days in succession—I mean three afternoons and evenings.

Q. Were you there when he received a telephone call from Chicago?

A. Yes, that was the last day, that was on a Sunday.

Q. Approximately what time of the day was that?

A. That was about six o'clock in the evening.

Q. This was in February, 1948?

A. This was the very end of February.

Q. Who was present this particular time?

A. Mr. and Mrs. Weissman, myself, my wife, and Mr. Knoll.

Q. All right.

A. The call came through and Mr. Knoll generally never answered the telephone, practically never answered the telephone, because he did not know how to speak English, and it was a call from Chicago.

By Mr Gerber: I object. How could he know?

By Mr. Downing:

Q. Who answered the phone?

A. I was sitting right there at the desk.

571 Q. Who answered it?

A. I don't know whether it was me or Mr. Weissman. It was one of us two.

Q. All right.

A. And Mr. Knoll was called and told that there was a person-to-person call from Chicago.

By Mr. Gerber: I object to this because I don't think it is within the knowledge of this witness. He was not on the phone.

By the Court: He said Mr. Knoll was told that it was a person-to-person call.

By Mr. Gerber: If he did not hear it—

By the Court: Well, he or Mr. Weissman answered the phone, and Mr. Knoll was told that it was a person-to-person call.

Objection overruled.

By Mr. Gerber: I object unless he answered the phone he is not in a position to answer the question.

By the Court: Well, he was in the room, he tells us. Overruled.

By Mr. Downing:

Q. Will you relate what took place after Mr. Knoll was told that?

572 A. Mr. Knoll got up immediately after having a discussion in a foreign language, which I am pretty sure was Hungarian—

By Mr. Owen: I object to that, if the Court please.

By the Court: Overruled.

By Mr. Downing:

Q. All right. And then what took place?

A. And then he stated to us that that was the call from Chicago he had been waiting these three days for, and asked me to try and contact and check what the very next plane to Chicago would be.

Q. Did you contact to find out when the next plane to Chicago would be?

A. No. Mr. Weissman looked up the number in the book for me and then he grabbed the telephone and took the telephone and called up.

Q. Who is "he" now?

A. Mr. Weissman called up the airlines.

Q. And were arrangements made in your presence and in the presence of Munio Knoll for him to catch the next plane?

A. Yes.

By Mr. Eben: I object to leading. Let him say
573 what was said. This witness seems to be intelligent.

By the Court: Oh well, overruled.

By Mr. Downing:

Q. What took place?

A. Mr. Weissman told Mr. Knoll that there was a plane, I don't know whether it was seven or eight o'clock that evening, New York time, and we took Mr. Knoll to the bus line, airport bus line.

Q. Approximately what time did you leave Mr. Knoll?

A. That was within 20, 25 minutes after the phone call.

Q. Directing your attention to April of 1948—

By Mr. Eben: I object to that question as completely immaterial.

By Mr. Gerber: I object.

By Mr. Eben: Nothing to do with any of the issues in this case, and I do not regard it as binding on my client, for the reasons advanced before, and also because it was after the termination of the alleged conspiracy, and not an act in pursuance of the conspiracy as alleged, and my client has not been established close enough to the conspiracy 574 to have it admissible against him in any event.

By Mr. Downing: It is very admissible. It ties in with the testimony—

By Mr. Gerber: I object to any statement the jury should not hear at this time

By Mr. Eben: There are only a few minutes left.

By the Court: We have to use them all.

(Whereupon the following proceedings were had out of the hearing of the jury:)

By Mr. Downing: I submit there is testimony of the witness Joseph Ludmer concerning a conversation he had with the defendant Munio Knoll on a Monday in February of 1948 in which he indicated Munio Knoll stated to him he had come home late from New York and had difficulty getting into his apartment, and when he got in he saw Marcel jump from the window. There was testimony of Ludmer that on that Monday he had first seen Marcel lying at home with a plaster cast on his arm. There is testimony he 575 had seen Marcel on Sunday and Marcel did not have any plaster cast.

By the Court: Yes.

By Mr. Downing: I think it is tied right in.

By Mr. Gerber: I think it is remote to tie an incident like this into the other one. I think both incidents are immaterial.

Your Honor previously stated you would admit it if it is material to the issues.

By the Court: Don't talk so much to me. Let me think.

By Mr. Gerber: I am sorry.

By the Court: All right.

(Whereupon the following proceedings were had in the presence and hearing of the jury:)

By the Court: The testimony of this witness with respect to the telephone call from Chicago to New York and his testimony with respect to the defendant Munio Knoll departing and going to the air port, is admissible only against the defendant Munio Knoll and will be received 576 and will be considered by you only as against the defendant Munio Knoll.

By Mr. Downing:

Q. Now directing your attention, Mr. Haberman, to April of 1948, did you have occasion in that month to see the defendant Munio Knoll?

A. I did.

Q. Where did you see him then?

A. Again at the Century Hotel.

Q. Who was present at that time?

A. My wife, Mr. Knoll and Mrs. Mania Knoll.

Q. Pardon?

A. And Mrs. Mania Knoll.

Q. Is this the same person that you had previously seen a photograph of at the first conversation that you have previously referred to in your testimony?

A. That is right.

Q. Did you have any conversation with Munio Knoll regarding his family status at that time and place?

A. Not at that particular time.

Q. Thereafter did the group of you go any place at that particular time?

A. We went out.

Q. And thereafter did you have occasion to again 577 see Munio Knoll?

A. Yes?

Q. And approximately when was that?

A. That was on that very same visit.

Q. Who was present at that time?

A. Just myself and Mr. Knoll.

Q. And did you have a conversation with Munio Knoll regarding his family status at this particular time?

A. I did.

Q. Will you relate what Munio Knoll said and what you said at that time and place?

By Mr. Eben: I object on behalf of Leopold Knoll.

By the Court: I will hear it and then I will rule.

By Mr. Eben: Excuse me?

By the Court: I will hear it and then I will rule.

By Mr. Eben: I am not objecting on the grounds I advanced before, that the act was in furtherance or not in furtherance of the conspiracy.

I object now merely to keep my record, because in my opinion there is no sufficient connection shown so 578 as to bind him by any conversation. That is the objection at this stage, on behalf of Leopold Knoll.

By Mr. Sokol: That is an objection I myself adopt. I wanted to make the statement over there.

By the Court: I don't understand you.

By Mr. Eben: My objection is based on the fact that Leopold Knoll has not been sufficiently connected with any—

By the Court: That is in the record. I have ruled against you on that. I have ruled there is sufficient to tie in.

By Mr. Eben: I am trying to make clear that I am perfecting my record on it, that is all.

By Mr. Downing:

Q. Will you relate the conversation, Mr. Haberman, please?

A. I told Mr. Knoll that by his actions it was quite plain that he still cared for his wife Mania Knoll and that my advice to him would be to go back, that the two of them should go back together again.

Mr. Knoll told me at that time that it was not as 579 simple as all that, that, that he—Mrs. Mania Knoll—when he one day, you know, when he came back from New York suddenly he found her with another man in his room, and that it was not as simple as that to go back with her.

By Mr. Eben: I object to that on the ground it is not in furtherance or in pursuance of any conspiracy, at this stage.

By the Court: My dear sir, I told you I would rule after I had heard it.

By Mr. Eben: But the vice of it is that the jury also hears it, and they ought not to be permitted to hear any irrelevant testimony.

By the Court: It is not irrelevant. It is admissible as against Munio Knoll, as I have ruled.

By Mr. Eben: If that is the court's ruling, all right, then I am content with that.

By the Court: I wish some of your associates would explain it to you—I have tried to make that clear—it is admissible only against Munio Knoll. Explain it to the gentleman.

580 By Mr. Eben: There have been a series of conversations, and while you have made it clear on other conversations, we have to make it clear on each conversation.

By the Court: Will you be seated, sir. I have made it clear on all of them. Will you be seated?

Proceed.

By Mr. Downing:

Q. Was there anything further at that particular conversation about that matter?

A. No, not at that time.

Q. Directing your attention to May, 1948, did you have occasion to see Munio Knoll?

A. I did.

Q. Where did you see him?

A. Again in the Century Hotel.

Q. Who was in the room at that particular time when you came there?

A. Mrs. Mania—Mr. Munio Knoll was in there alone.

Q. And who was with you at that time?

A. My wife.

Q. And after you were there did anyone else come into the room?

581 A. Yes. Mrs. Mania Knoll came out from the bath room.

Q. What time of day was this?

A. Late afternoon this was.

Q. Thereafter did the group of you, four of you, go any place?

A. Yes, we did.

Q. Will you tell the court what took place then and where you went?

A. Yes. We went out to a night club again, and—

Q. Was that in New York?

A. That was in New York.

We were joined, before going to the night club, by Mr. and Mrs. Weissman, and we spent a nice evening together.

Q. There were six of you at the night club, is that right, sir?

A. Yes. We took a picture that evening.

582 Q. What club was it, do you recall?

A. I don't offhand recall.

Q. Speak out loud.

A. I don't recall at the moment.

Q. Directing your attention to Government's Exhibit 3, marked for identification, I ask you to look at that and ask you if you have seen that before?

A. Yes, I did.

Q. When was that photograph taken?

A. That photograph was taken the evening of May 18th.

Q. Was that in 1948?

A. 1948.

Q. In relation to the date that you have previously mentioned, was that taken on the same day?

A. On the same day, same evening.

Q. Of course, you were present when that picture was taken, is that right, sir?

A. That is right.

Q. Will you tell the Court and jury—identify the persons who were present, commencing with the right hand corner of the picture.

A. Myself, Mrs. Blanche Weisman, Mr. David Weisman, my wife, Mr. Munio Knoll and Mrs. Mania Knoll.

583 Q. With respect to the photograph, is that a true and correct photograph of the people who were with that group at that particular time and place?

A. That is true.

Q. With respect to the writing on the inside cover to the left, I ask you who placed that writing thereon, if you recall?

A. The writing was placed on by Mrs. Mania Knoll.

Q. And was that applicable to all the writing or—

A. No. It was signed by her, by Mr. Z. Romankiewicz, and by David, Blanche—

Q. And did you see those people place that writing on that document at that time?

A. Yes.

Q. And was that in front of all the people who were present at that time and place?

A. That is right.

Q. And did you receive that photograph at that particular place and at that time?

A. Yes, I did.

Q. After the date of this photograph, when did you next see the defendant Munio Knoll?

A. I believe it was the following morning.

-Q. Where did you see him?

A. At the Century Hotel.

584 Q. Who was there at that time?

A. Mr. Knoll and Mrs. Knoll—or Romankiewicz.

Q. Did you have any conversation with him at that time about this matter you have previously testified about?

A. Yes, I did, and I had a conversation with Mr. Knoll.

Q. Anyone else?

A. Private. Nobody else present.

Q. Will you tell the Court and jury what that conversation was, what did Mr. Knoll say and what did you say, as best you recall?

By Mr. Eben: Objection again, if your Honor please.

By the Court: I will hear it and then I will rule as to whom it is admissible.

By Mr. Downing:

Q. Will you go ahead, please, Mr. Haberman?

A. Yes. I again told Mr. Knoll, I asked why he didn't get together again with Mania, as he was showing that he still loved her. He told me that it wasn't so simple. And then he told me that one day when he returned to New

York he found her with another man and the other
585 man—I believe he said 11:00 o'clock in the evening—the other man was Marcel Lutwak, and although he wants to forgive that to his wife, the fact was that Mr. Lutwak, that she let Mr. Lutwak jump out of the window to hide from him, and that Mr. Lutwak was seriously hurt by that, and the whole family was up in arms against Mania for letting him jump out of the window and endangering his life.

Q. Was there anything more to the conversation about that matter at that time and place?

A. Yes, there was. He told me that he would seriously think it over, and he thinks he might get together with her in spite of all the objections.

By Mr. Downing: If your Honor please, I can continue, but—

By the Court: I think that conversation is admissible against the defendant—

By Mr. Gerber: Munio Knoll?

By the Court: —Munio Knoll only, and it will be so received.

By Mr. Gerber: I would like at this time, before we recess—may I note an objection to all the testimony of this witness at this time, and ask that it be stricken and the Court instruct the jury to disregard it, on the ground 586 it is irrelevant, and the testimony as to conversations transpiring after the end of the alleged conspiracy is not admissible against Munio Knoll.

By the Court: And is what?

By Mr. Gerber: It is, therefore, not admissible against Munio Knoll under any consideration.

By the Court: Motion denied.

Two o'clock, ladies and gentlemen.

(Thereupon the further trial in the above entitled case was recessed until 2: o'clock p. m. of the same day, Thursday, January 11, 1951.)

587

* * (Caption,—No. 50 CR 464) * *

Chicago, Illinois,
Thursday, January 11, 1951,
2:00 o'clock p. m.

Met pursuant to recess.

Present:

Mr. Downing
Mr. Owen
Mr. Gerber
Mr. Sokol
Mr. Bartoline
Mr. Sokol
Mr. Eben
Mr. Watt
Mr. Weissbourd

And Thereupon the following further proceedings were had herein:

(The following proceedings were had out of the hearing and presence of the jury:)

By Mr. Eben: There are several matters in the record, your Honor, that need correction. I think we ought to do it now, before the jury comes in. There are only 588 two I direct the Court's attention to now. I have already discussed them with Mr. Downing. On page 415 of the record, there appears the word "questions". The proper word to go in at that particular place is "signatures". Is that correct?

By Mr. Downing: That is correct.

By Mr. Eben: At page 383, there appears what appears to be some questions asked by Mr. Gerber, actually starting with the words: "When you received your declaration of intention", which appears on page 383, that is the answer as given by Miss Algano yesterday, reading from her stenotype notes of Government's Exhibit 13, and I think the record should so show.

By the Court: Do you agree?

By Mr. Downing: I agree, your Honor.

By the Court: Very well.

By Mr. Eben: Incidentally, in case I have not made it clear, Miss Algano's answer extends up to page 385 to where another question is indicated by Mr. Gerber.

By Mr. Downing: Yes. I think the record so shows, because it shows in quotes.

By the Court: Do you agree to that?

By Mr. Downing: I agree, your Honor.

By the Court: Very well.

589 (The following proceedings were had in the presence and hearing of the jury:)

MORRIS HABERMAN, a witness on behalf of the Government, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (Cont'd) By Mr. Downing.

Q. What is your name, please?

A. Morris Haberman.

Q. Now, keep your voice up so that that the jurors and defendants' counsel and the defendants can hear you, please.

A. All right.

Q. You are the same Mr. Haberman who was sworn and testified this morning, is that right?

A. That is right.

Q. Now, this morning at recess, you had told about conversations in New York City, in May of 1948. After that date, when did you next see the defendant Munic Knoll?

A. On June 4, 1948.

Q. Where was he at that time, sir?

A. In the lobby of the Stevens Hotel in Chicago.

590 Q. Who was with him at that time?

A. Nobody.

Q. Where did you go from the Stevens Hotel?

A. We stayed in the lobby.

Q. Did you have a conversation with him at that time?

A. Yes, sir, we did.

Q. Will you relate to the Court and jury what took place as far as conversations at that time and place?

By Mr. Eben: Objection on the same ground as heretofore.

By the Court: I will rule on it after I have heard it.
By the Witness:

A. The first thing that was mentioned was that I had spoken to his wife, Mania, on the telephone, the same day, and she had invited me up to the apartment, and I refused to go there, and Mr. Romankiewicz, accused me of being rude to his wife.

By Mr. Downing:

Q. All right.

A. And we started discussing that. We started off on poor terms, and we had an argument, and I left him there.

591 By Mr. Eben: I think the last part, relative to the argument, ought to go out.

By the Court: Oh, it may stand.

By Mr. Eben: It calls for a conclusion, your Honor.

By the Court: I know, but let it stand.

By Mr. Downing:

Q. Thereafter, after that time in June, 1948, when did you next see him?

A. I saw him the next day.

Q. Where did you see him on the next day?

A. In an office in downtown Chicago.

Q. Who was with you at that time?

A. Mr. David Weisman.

Q. Anybody else?

A. Yes, there was a relative, I believe a son-in-law of Mrs. Treitler.

Q. Was this in June of 1948?

A. That is right, June 5th.

Q. Was this in June of 1948?

A. That is right, June 5th.

Q. Now, at that time and place, did you have a conversation regarding the matters about which you testified this morning?

A. Yes, sir, I did. I told Mr.—

592 By Mr. Sokol: Objection. There were no defendants present, as I understand it, at this meeting.

By Mr. Downing: Your Honor, I think he said Munio Knoll was present.

By the Court: Munio Knoll was present, as I understand it. Is that correct?

By the Witness: No, Munio Knoll was not present at the first meeting.

By the Court: Who was there?

By the Witness: Oh, yes, Munio Knoll was present.

That is the second meeting I was talking about. Yes, Munio Knoll was present at the second meeting.

By the Court: He may answer.

By Mr. Gerber: Our objection I would like to have stand with reference to that.

By Mr. Eben: I object on behalf of Leopold Knoll. And may I call the attention of the Court, you did not rule with reference to the last conversation?

By the Court: I thought I did.

By Mr. Eben: My recollection is slightly different. 593 Out of an abundance of caution, I call your Honor's attention to it. It was a very short conversation about which there was an argument. I do not think you ruled on that.

By the Court: This conversation, if I have not already ruled, ladies and gentlemen, the conversation which the witness has testified to with Mr. Munio—is that the name?

Mr. Mr. Downing: Munio.

By the Court: Munio Knoll, at which time the witness said there was an argument, is admissible only against Munio Knoll, and it will be received by you only against Munio Knoll.

By Mr. Downing: •

Q. Now, with respect to this conversation about which you were about to testify, what was said by Munio Knoll, or anyone else, in his presence at that time and place?

A. During the conversation, I told Mr. Munio Knoll. I knew that he had come to this country illegally.

By Mr. Bartoline: I cannot hear him, your Honor.

By the Witness: That I know that he had come to this country illegally. That I also knew his wife, Mania, 594 had come illegally, and that his brother had come here in the same manner. The other gentlemen present said no, his brother had a perfect right to get married.

By Mr. Downing:

Q. Do you remember who that was?

A. That was Mr. Honoroff.

Q. Mr. Honoroff?

A. Yes.

Q. All right, what else was said?

595 A. Nothing much about this matter, except Mr. Knoll asked me to promise that if I straightened out—all the matters in the discussion were straightened out, I would not speak about my statement about his illegal entry and the others' entries to anybody.

Q. Now directing your attention to Government's Exhibit—

By Mr. Eben: Now, that is the vice of permitting that conversation, and I ask your Honor to rule on that conversation with respect to Leopold Knoll.

By the Court: Ladies and Gentlemen, this conversation now recited by the witness is admitted only as to Munio Knoll. It is not admissible as against any of the other defendants, and not to be considered by you as against any of the other defendants:

By Mr. Gerber: I make the motion, your Honor, that this conversation be stricken, and the jury instructed to disregard it. I am objecting to it as to Munio Knoll for the purpose of the record.

By the Court: On what ground?

596 By Mr. Gerber: On the ground, your Honor, it has nothing to do with the conspiracy. That is all over. If the alleged conspiracy existed, it was all over by that time, and it is not a statement by Munio Knoll himself, but by other people present at the time who were making statements impugning things to Munio Knoll about past events. Munio Knoll cannot be bound by statements of other people about what they think Munio Knoll did, your Honor.

By the court: I think the conversation is admissible. Overruled.

By Mr. Downing:

Q. Directing your attention to Government's Exhibit 24, marked for identification, I ask you to look at that, and I ask you if you have seen that document before.

A. May I make a statement?

By the Court: Yes.

By the Witness: Your Honor, I interpreted the question that the United States Attorney asked me wrongly, and I gave a wrong answer. This conversation did not take place June 5th.

By the Court: If you made an error, you have a
596A right to correct it.

By Mr. Downing:

Q. What was the date of the conversation?

A. The conversation as I now state it took place on, I believe, on Saturday, September 18th.

Q. In September?

A. In September, not on June 5th.

Q. What year was that?

A. 1948.

Q. But with respect to the conversation, it was as you have recited it?

A. Yes, the whole conversation took place, but on a different date.

Q. Now with respect to Government's Exhibit 24, have you seen that document before?

A. Yes, sir.

Q. Can you identify all the pictures in that document?

A. I can.

Q. Were you present at the time that photograph was taken?

A. Yes, I was.

Q. Where was it taken?

597 A. It was taken here in Chicago in a night club, I believe.

Q. Do you remember approximately when it was taken?

A. It was taken in the evening, either on June 4th or June 5th, in the evening.

Q. What year was that?

A. 1948.

Q. Is Government's Exhibit 24, which you have there, a true and correct photo of the people who were with you at that time and place?

A. It is.

Q. Commencing with the right side of the picture, will you identify the persons whom you see in it?

A. Mania Romankiewicz, my wife, myself, Mr. Weissman and Mr. Knoll.

Q. When you say Munio Romankiewicz, you also mean Munio Knoll, and also by Mania Romankiewicz, you mean Mania Knoll?

A. That is right.

Q. Was the photo obtained at that time and place?

A. Yes, sir.

Q. Now, prior to the date on which this photograph, Government's Exhibit 24, marked for identification,
598 was taken, had you had occasion to visit the residence of Munio Knoll here in Chicago?

A. Yes.

Q. When did you visit that residence?

A. In the morning of June 5th.

Q. Approximately what time of the morning was that?

A. About nine o'clock.

Q. Who was present at that time?

A. Mr. Munio Knoll and Mrs. Mania Knoll and my wife.

Q. Where was that apartment located, if you recall?

A. Maypole Avenue.

Q. Here in the City of Chicago?

A. Yes, sir, in Chicago.

Q. Do you recall what floor of the building it was on?

A. I believe it was the third floor.

Q. Do you recall what size of apartment it was?

A. A small apartment.

Q. Do you recall how many rooms there were in it?

A. Yes, sir.

Q. How many?

A. Three rooms.

Q. What type of rooms were they?

599. A. Well, one was a small bed room and one a small living room and kitchen, and a bath room.

Q. Then it was on that night, was it, you then proceeded to this club at which this picture I last showed you was taken, is that right?

A. No, as I said before, it may have been the 4th or the 5th.

Q. Now, after you were at this particular club at which the picture was taken I have just shown you, when did you next have occasion to see the defendant Munio Knoll?

A. On Sunday. I may be wrong in the dates, but I believe it was Sunday June 7th.

Q. Is this still in 1948?

A. 1948.

Q. You are not quite sure of the date, however, is that right?

A. I am quite sure that Sunday was the 7th, but I now realize I said Saturday the 5th, meaning the 6th, and the 4th Friday, meaning the 5th.

Q. It was that week end?

A. That is right.

Q. The first week end in June of 1948?

A. That is right.

600. Q. When did you next see the defendant Munio Knoll after this visit there at the club, the night club at which this photograph, Government's Exhibit 24 was taken?

A. I don't understand which day after which day was it. Was it after Saturday you mean?

Q. I show you Government's Exhibit 24 marked for identification, and ask you with relation to the date that this photograph was taken when did you next see the defendant Munio Knoll?

A. I don't know when that was taken, Friday or Saturday, but I believe it was Friday.

Q. After this then, when did you next see him?

A. On Saturday. It would have been in his apartment in the early morning at nine o'clock.

Q. All right. That is the time you have referred to in your testimony, is that right?

A. That is right.

Q. Now directing your attention to Government's Exhibit 24 marked for identification, I ask you to look at that, and ask you if you have seen that before?

A. I did.

Q. I ask you if you were present at the time that 601 photo was taken?

A. I was.

Q. Where was that photo taken?

A. In the night club here in Chicago on June 7th.

Q. On June 7, 1948?

602 A. It was on Sunday.

Q. On Sunday, around June 7, 1948, is that right?

A. Yes.

Q. Could you identify the parties who were present and identified in that picture?

A. Yes, sir.

Q. Starting at the right hand side of the picture, will you identify them for the Court and jury, the different persons whom you see in that photograph?

A. That is the daughter of Mrs. Wickers, myself, an entertainer in the night club, Mrs. Mania Knoll, my wife, Mr. Munio Knoll, Mrs. Wickers and Mr. Weisman.

Q. Is that a true and correct photo of the people who were with your group at that time and place?

A. Yes, sir.

Q. Was that photograph obtained at that particular time and place?

A. It was.

Q. Now, directing your attention to after that particular evening and time, when did you next see the defendant, Munio Knoll?

A. About 4 a. m. the next morning.

Q. Where did you see him at that time?

603 A. In an apartment on Maypole avenue.

Q. Who was with you at that time?

A. My wife came with me.

Q. Who did you see at the apartment?

A. Mr. Weisman and Mr. Knoll and Mrs. Mania Knoll.

Q. Where was Mr. Weisman at that time?

A. Mr. Weisman opened the door for us.

Q. Where was Munio Knoll and Mania Knoll?

A. They were in bed.

Q. They were in what room?

A. They were in the bed room.

Q. Did you see in the bed room at that time and place?

A. That is right.

Q. Where were you going at that particular time; on the morning of that day?

A. We were going to New York.

Q. Who was going to New York?

A. Myself and my wife and Mr. Munio Knoll.

Q. Did you thereafter then go to New York with the defendant Munio Knoll and your wife?

A. Yes, I did.

Q. Now, directing your attention to the defendant Regina Treitler, approximately when did you first
604 approximately meet her?

A. On Sunday, I believe September 19th.

Q. What year was that?

A. 1948.

Q. Where did you meet Regina Treitler?

A. At her apartment.

Q. Who was present at that time?

A. My wife, Mr. Weisman, and myself.

Q. Did you have a conversation at that time regarding the coming into the United States of Munio Knoll and Leopold Knoll or anyone else?

A. I did.

Q. Will you relate what was said at that time and place?

By Mr. Gerber: That is objected to on behalf of Munio Knoll.

By Mr. Eben: Also on behalf of Leopold Knoll.

By the Court: I will hear it and rule on it after I hear it.

By Mr. Downing:

Q. Will you proceed and answer the question?

A. I mentioned to Mrs. Treitler the fact that Mr. Munio Knoll and Mania Knoll and Pauldi Knoll—

By the Court: Who is that?

605 By the Witness: Leopold Knoll. I mentioned that they had come in illegally, and we were discussing it, and Mrs. Treitler said that Munio Knoll and Mania Knoll had been nothing but trouble to her since they came here, and that she was very sorry that she helped them to come to this country. She called Mr. Knoll a gestapo agent and a nazi and the black sheep of the family; and she was very put out about him. The discussion kept on going about that manner.

By Mr. Downing:

Q. Was it about the same—

A. Yes, sir. Then she suggested that we go and meet Mr. Treitler.

Q. Thereafter, did you meet Mr. Treitler?

A. I did.

By Mr. Gerber: Your Honor, I move all this be stricken out as to Munio Knoll.

By the Court: Who was present at the time of this conversation, Mr. Haberman?

By the Witness: Mrs. Treitler, my wife, Mr. Weisman, and myself.

By the Court: The conversation just detailed by the witness is admissible, ladies and gentlemen, against 606 Mrs. Regina Treitler only, and it is not to be received or considered by you against any of the other defendants.

By Mr. Sokol: Let the record show I object to the Court's ruling.

By the Court: What is the ground of your objection?

Mr. Sokol: This is a conversation that is alleged to have taken place in September, 1948. That is the grounds of my objection.

By the Court: Overruled.

By Mr. Gerber: I would like to make an objection in the record that the testimony that he is giving is highly

prejudicial to my client. I would like to make a motion for a mistrial, in view of that.

By the Court: Motion denied.

By Mr. Downing:

Q. During the period of time that you were acquainted with Muno Knoll and Mania Knoll, did you know Mania Knoll by any other name than the last name which you have referred to in your testimony?

A. Yes, sir.

Q. What was the last name you knew Mania by?

607 A. Romankiewicz.

Q. Also Mania Knoll?

A. That is right.

Q. Was she at any time ever introduced to you as Mrs. Maria Lutwak?

A. No.

By the Court: What is this name you referred to? Spell it.

A. P-a-u-l-d-i.

By the Court: Who does that refer to?

A. Leopold.

By Mr. Downing: Your Honor, at this time, the Government would like to offer in evidence Government's Exhibits 22, 23, 24 and 25, each marked for identification, and they may cross examine.

By Mr. Eben: I have no cross examination of the witness. I do not regard any of these exhibits as being admissible against my client, Leopold Knoll, and I therefore object to them. And I also would move to strike out all the testimony of Mr. Haberman, and the jury instructed to disregard it on the ground that by it the Government has attempted to impeach its own witness, 608 a witness for whose credibility they vouched when they put her on the stand, namely, Maria Lutwak. When they put her on, they put her on, I presume, thinking that the jury would believe her. Now they are trying to impeach her, and I move the Court to strike that testimony.

By the Court: Motion denied.

By Mr. Sokol: I would like to object to the statement regarding Regina Treitler, first, because it succinctly states that the defendant Treitler characterized her brother in an ignominious fashion, and it has no relation

to any admission, and no admission was made. And secondly, that the statement testified to by the witness with respect to her is a long statement, and it is immaterial and prejudicial.

By the Court: Motion denied.

By Mr. Gerber: I would like to make an objection to the admissibility of Government's Exhibits 22, 23, 24 and 25, on the ground that those photographs, in and of themselves, are immaterial to the issues in this case in every respect, and can only tend to create some sort of prejudice in the case, and I move that they be stricken, and that the jury be instructed to disregard any testimony with regard to the photographs or the identification of them.

By the Court: Motion denied.

By Mr. Bartoline: I make the same motion.

By the Court: Motion denied.

By Mr. Downing: May the photographs be received?

By the Court: They may be received.

By Mr. Downing: That is Government's Exhibits 22, 23, 24 and 25.

By the Court: They may be received.

Mr. Bartoline: I am making a motion, if your Honor please, that the photographs not be received, because they contain writings, and I think they are highly prejudicial in this case.

By the Court: Let me see them.

By Mr. Downing: Your Honor, I submit he said that is what he saw at the time he identified the pictures as being on the covers. He identified the handwriting of the one in red, on the inside cover.

By Mr. Bartoline: There are some writings on 610 there, too, if the Court please, which were not on the pictures at the time that the pictures were taken.

By Mr. Downing: Of course, that writing of the persons has been identified in the picture.

By the Court: I do not see anything wrong with Government's Exhibit 24 for identification. There is nothing there except the name of the restaurant, and the names of the photographer. It may be received.

By Mr. Eben: Generally?

By the Court: Yes.

-(Said document, so offered and received in evidence, was marked Government's Exhibit 24.)

By the Court: I do not see anything wrong with Government's Exhibit 25. "Scene in City of Chicago World Famous Inn and Restaurant."

As to Government's Exhibit 25 for identification—do you know who wrote this here?

By the Witness: Yes, sir.

By the Court: Who?

By the Witness: Mania Knoll.

By the Court: How much did she write?

By the Witness: She wrote this.

611 By the Court: Well, read what she wrote.

By the Witness: "To Eleanore and Morris, May 19, 1948. Mama."

By the Court: And the next word?

By the Witness: The next was written by Mr. Z. Romankiewicz. That is Munio Knoll.

By the Court: What is this following?

By the Witness: Following, "Well, done, Morris. Your friends, David and Blanche." That is David and Blanche Wiseman.

By the Court: Are you the Morris referred to?

By the Witness: Yes.

By the Court: Who wrote these names on the photographs?

By the Witness: They were written at the time I was questioned to identify them.

By the Court: These are the words you told about?

By the Witness: Yes, sir.

By the Court: I do not see anything wrong with that. It may be received.

(Said document, so offered and received in evidence, was marked Government's Exhibit 25.)

612 By the Court: Did you tell us about these names written around here?

By the Witness: Those two were written down when I was asking them to identify these people.

By the Court: You wrote them there?

By the Witness: No. I showed this to be Lutwak, and the man wrote down the names as I dictated.

By the Court: Who write it down?

By the Witness: The investigator.

By the Court: Oh, the investigator?

By the Witness: Yes.

By the Court: Do the names around there correctly identify the persons at the table?

By the Witness: Yes.

By the Court: Objection overruled. It may be received.

By Mr. Eben: I said I had no cross examination of this witness. I don't know about the others.

By Mr. Sokol: No cross examination.

By Mr. Bartoline: No cross examination.

By Mr. Gerber: No cross examination.

613 By Mr. Downing: No cross examination.

That is all, Mr. Haberman. Thank you.

(Witness excused.)

By Mr. Downing: May I have permission to show these to the jury?

By the Court: Yes.

By Mr. Sokol: I don't see the appropriateness of showing these pictures to the jury at this time. Let the record show my objection to it.

By the Court: Yes.

By Mr. Gerber: I object for Munio Knoll also.

By Mr. Eben: Also as to Leopold Knoll.

By the Court: Overruled.

By Mr. Bartoline: Also as to Lutwak.

By Mr. Eben: May we proceed, your Honor?

By the Court: The jury are looking at the photographs. They can't do two things at once very well.

654 By the Court: We will take a short recess, Ladies and Gentlemen.

(Whereupon the following proceedings were had out of the presence and hearing of the jury:)

By the Court: Let me speak to counsel a moment.

I have read Government's Exhibit 14. I have
655 read a copy of it, what purports to be a copy of it. In that copy counsel for the Government has indicated certain questions and answers which he has stated his intention of not reading unless counsel for defendant insists.

I think the judgment of counsel for the Government is good in that respect, and counsel for the Government will refrain from reading questions 2, 17—I will give you this.

By Mr. Downing: Yes, sir.

By the Court: 2, 17, 18, 19, 20, 21, 22, 23 and 29, and the answers thereto.

And if counsel for Munio Knoll wants to read those questions and answers he may do so, and take the responsibility therefor.

By Mr. Downing: Yes, sir.

By Mr. Gerber: Thank you, your Honor.

By Mr. Downing: If your Honor please, if counsel for Munio Knoll does not desire to and does not read them then at the proper time will it be proper to make a motion to strike them physically from the exhibits?

656 By the Court: Yes.

By Mr. Downing: Thank you.

By the Court: Take a short recess.

(Recess taken.)

657 By the Court: Proceed, gentlemen.

By Mr. Gerber: On behalf of the defendants, we appreciate your Honor's position, and we are entirely in accord with everything and every page in here, and agree that it be deleted with the exception of page 17. We would like to have that read or we will read it.

By the Court: Let me see it.

By Mr. Gerber: Otherwise, the rest of it may be left out.

By the Court: If you want it, you can have it.

By Mr. Gerber: Just page 17, your Honor. The others may be left out. We agree to that.

By Mr. Downing: If you have no objection to the Government counsel reading it, I will read it.

713 By the Court: We will recess at this time.

By Mr. Eben: Before you recess, your Honor, at this time, may we have an instruction to the jury that these two statements which were just read are not in evidence against Leopold Knoll and are not to be considered against him.

By the Court: These two statements that have been read are in evidence only against the defendant Munio Knoll, and nobody else, and you are to consider them only as against Munio Knoll, and nobody else.

By Mr. Gerber: Your Honor, I have a request to make at this time. I have been trying—

By the Court: You may be excused until ten o'clock tomorrow morning, Ladies and Gentlemen.

(Thereupon the jury was excused until 10:00 o'clock a. m. of the following day, January 12, 1951, and the following proceedings were had out of the presence and hearing of the jury:)

719

* * * Caption—No. 50 CR 464 * *

Chicago, Illinois,
January 12, 1951,
10:15 o'clock a. m.

Met pursuant to adjournment.

Present:

Mr. Downing

Mr. Owen

Mr. Gerber

Mr. Bartoline

Mr. Sokol

Mr. Eben

Mr. Watt

Mr. Weissbourd

And thereupon the following further proceedings were had herein, out of the presence and hearing of the jury:—

By the Clerk: Case on trial.

By Mr. Downing: If your Honor please, I have a correction here I would like to make for the record, in connection with the testimony of the witness Morris Haberman on page 538, line 6.

720 It refers to Government's Exhibit 3. I showed Mr. Haberman photographs only, and the number of the photograph was Government's Exhibit 23.

I would like to have that corrected.

By the Court: Any objection?

By Mr. Eben: No objection.

By the Court: All right.

By Mr. Downing: If your Honor please, there is one other statement I would like to make to the court before you bring in the jury, because I anticipate the jury would not be in here very long and they would be again out.

The next witness the Government intends to call is

Bess Osborne: There may or there may not be, I cannot anticipate, an objection to her testimony. I am mentioning it now before the jury is brought in so that if there is to be an objection to her testimony I think it would be more expeditious if it is made now and discussed, and then we would not have to bother the jury, bringing them in and sending them out again.

By the Court: All right.

721 By Mr. Eben: At the same time, gathering from what transpired yesterday, that the District Attorney was going to proceed by reading statements, I would also like to know now if you propose to read the other statements which were in evidence at any time before the close of your case.

By Mr. Downing: Before the Government rests the Government, with leave of court anticipates reading all the exhibits, the pertinent parts of exhibits in the case to the jury.

By Mr. Gerber: Counsel is right in his anticipation. Since he has informed the court the next witness will be Bess Osborne, the wife of Munio Knoll, on his behalf I wish now to object to the competency of her testimony as his wife, and ask for voir dire examination.

I intend to cite legal authorities and invoke the decisions that have been presented heretofore in connection with objection to the testimony of Maria Lutwak when she took the stand.

722 By the Court: You don't need any voir dire examination. There has been plenty of testimony here which certainly makes it a question of fact as to whether this woman is the wife of Munio Knoll. I will submit it to the jury and let this woman testify. You save your record.

By Mr. Gerber: That is what I want to do.

By the Court: Make it right now. Make all the objections you want.

By Mr. Gerber: All right. I am objecting to the testimony of Bess Osborne on the grounds that she is an incompetent witness, being the wife of the defendant Munio Knoll, alias Zygmunt Romankiewicz, and I ask for a voir dire examination on that score.

By the Court: No—

By Mr. Gerber: For the purpose of the record I want to show I am asking for it.

By the Court: All right. I say to you, when she is on the stand you can ask her all the questions you have a mind to, and it may be assumed you had your voir dire and have had those answers.

By Mr. Gerber: Right.

723 By the Court: All the answers which she then makes.

By Mr. Gerber: I would like the record to show also in connection with my objection that I intend to cite all of the authorities and would like to invoke them as a part of my objection, all of the authorities legally and the decisions which have been heretofore invoked in the trial of this case in connection with the objection heretofore made to the testimony of Maria Lutwak when she took the stand.

By the Court: Objection overruled.

*By Mr. Sokol: That motion with respect to Bess Osborne's incompetency is also made on behalf of Regina Treidler.

By Mr. Eben: And Leopold Knoll.

By Mr. Bartoline: And Marcel Lutwak.

By Mr. Weissbourd: I call your Honor's attention to the case of Miles v. United States—

By the Court: Is that the case that says she cannot testify against anybody because, if she testifies as to a conspiracy, she will be testifying against her spouse? Is that the case?

724 By Mr. Eben: No.

By Mr. Weissbourd: I don't think so. This case has not yet been cited.

By the Court: What does that say?

By Mr. Weissbourd: That says that where the issue the jury is to decide is whether there was a valid marriage, the person, the validity of whose marriage is questioned, is not competent to testify against the husband because the court is invading the province of the jury. This is the case of the United States Supreme Court, and also I can cite a more recent case which still adheres to this view.

By the Court: Well, I will submit it to the jury.

By Mr. Watt: I understand your Honor's ruling, that there is sufficient evidence here in your opinion to indicate she is not the wife of Munio Knoll, and that is an issue which you will let the jury decide.

By the Court: Yes.

By Mr. Watt: May I further point out to your Honor that that ceremony took place in Paris, France, and there has been no proof offered by the Government as to
725 what the law of France is as to the validity of marriage, and the validity of the marriage must be determined by the law of the place where the marriage was contracted, and the prosecuting attorney has not sustained his burden by proving what that law is.

By the Court: I would assume the law of Paris, France, is the same as the law of Chicago, Illinois, with respect to people going through something that is a mockery, which they did not intend to be a marriage.

By Mr. Downing: The law of France is that the law of the countries where the foreigners are born, the law of the persons applies.

By Mr. Sokol: Mr. Downing has not introduced any law to that effect.

By Mr. Watt: That is part of the prosecutor's burden, to show the law of the place of the marriage.

By the Court: No.

By Mr. Eben: We would like to make an offer of proof.

By the Court: The law of France, if it is pertinent, is the same as in Illinois, that if people go through a
726 mockery it is not a marriage.

By Mr. Eben: May we make an offer of proof?

By Mr. Gerber: I want to make an offer of proof.

By the Court: Go ahead, make it.

By Mr. Gerber: I would like to call upon Mr. Downing to produce the marriage certificate between Bess Osborne and Munio Knoll because, according to Mr. Knoll—

By the Court: I am not going to fuss around here. Are you going to put that in?

By Mr. Downing: I can. I have got it.

By the Court: Produce it for them. They can show it on cross examination.

By Mr. Downing: All right, sir.

By the Court: Anything else?

By Mr. Downing: I have nothing else, your Honor.

By the Court: Bring in the jury.

727 (Whereupon the following proceedings were had in the presence and hearing of the jury:)

By Mr. Downing: Bess Osborne.

BESS OSBORNE, called as a witness on behalf of the Government, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Downing.

Q. State your name, please.

A. Bess Osborne.

By the Court: Bess Osborne?

By the Witness: Yes.

By the Court: —b-o-r-r-e?

By the Witness: —b-o-r-n-e.

By Mr. Downing:

Q. What is your address, please?

A. 4646 Sheridan.

Q. At Chicago, Illinois?

A. Chicago.

Q. What is your business or occupation at the present time?

A. Stenographer.

Q. Have you ever been a member of the United States military forces?

A. Yes, I have.

728 Q. What branch?

A. The U. S. Navy.

Q. And from approximately what date until approximately what date?

A. January 25, 1943 until December 2, 1945.

Q. Did you receive an honorable discharge certificate on leaving the United States Navy?

A. Yes, I did.

Q. Are you acquainted with the defendants Munio Knoll, known as Zygmunt Romankiewicz, Marcel Lutwak, Regina Treitler and Leopold Knoll?

A. Yes.

By Mr. Downing: May we have a stipulation that the witness can identify the defendants in the court room?

By Mr. Sokol: Yes.

By Mr. Gerber: Yes.

By Mr. Eben: As far as I am concerned, it is all right.

By Mr. Gerber: I would like to renew my objection for the purpose of the record to all of this testimony on the grounds of the incompetency of the witness.

By the Court: Overruled.

By Mr. Gerber: I would like to have a continuing
729 objection to all of this testimony.

By Mr. Downing:

Q. Have you ever been married?

A. Yes, I have.

Q. When was the first time you were married?

A. In 1934.

Q. To whom were you married?

A. William Osborne.

By the Court: That last gentleman over there must hear everything you say. Will you speak loud enough so that he can hear you?

By the Witness: Yes.

By Mr. Downing:

Q. Did you obtain a divorce from William Osborne?

A. Yes, I did.

Q. Approximately what date was that?

A. December, 1941.

Q. Directing your attention to November, 1947, did you participate in a marriage ceremony?

A. Yes, I did.

Q. Where at?

A. In Paris, France.

Q. And with whom?

A. With Zygmunt Romankiewicz.

730 Q. Is that the defendant Zygmunt Romankiewicz that is in the court room?

A. Yes, it is.

Q. Who else was present at that time and place?

A. Leopold Knoll and Bernard Wireberg.

Q. Those were the only persons present besides yourself and Zygmunt Romankiewicz, is that right?

A. Yes.

Q. Whereabouts in Paris, if you recall, did this marriage ceremony take place?

A. At the City Hall.

Q. How long had you known Zygmunt Romankiewicz at the time the marriage ceremony was performed?

A. About one week.

Q. Under what name did you know him?

A. Zygmunt Romankiewicz.

Q. Is that the name that he used at the time the marriage ceremony was performed?

A. Yes.

Q. Where did you first meet Zygmunt Romankiewicz?

A. In Paris, France.

Q. And it was approximately a week before you participated in the marriage ceremony?

A. Yes.

731 Q. Who introduced you to Zygmunt Romankiewicz?

A. Regina Treitler, Mrs. Regina Treitler.

Q. And that is the defendant Regina Treitler here that you see in the court room?

A. Yes.

Q. Where did Mrs. Treitler introduce you to Zygmunt Romankiewicz?

A. At the Paris airport.

Q. Prior to the time you were in Paris, France, in November, 1947, had you had occasion to meet any of the other defendants?

A. I met Marcel Lutwak and Mrs. Treitler.

Q. And directing your attention to Marcel Lutwak, approximately when, as best you recall, did you first meet him?

A. About the first or second week of September, 1947.

Q. And where were you at that time?

A. I was at the place of business of Mrs. Zapler on Madison street near Central Park avenue.

Q. Is that Mrs. Anne Zapler?

A. Mrs. Anne Zapler.

Q. And who introduced you to Marcel Lutwak?

A. Mrs. Zapler.

Q. Did you have any conversation with Marcel
732 Lutwak and Anne Zapler at that time and place?

A. Yes, I did.

Q. Will you relate to the court and jury the conversation that took place at that time and place?

By Mr. Sokol: I object.

By Mr. Eben: I object also on behalf of Leopold Knoll.

By Mr. Gerber: In addition to my other objection, as to

By the Court: Objection overruled.

By Mr. Gerber: In addition to my other objection, as to

Munio Knoll, I object on the ground of hearsay, out of the presence of the—

By the Court: Overruled.

By Mr. Eben: I have the same objection, of course.

By the Court: Overruled.

By Mr. Downing:

Q. Will you relate, in substance, as best you can, the conversation you had with Marcel Lutwak and Anne Zapler at that time and place?

A. Mrs. Anne Zapler had nothing to say, but Mr. Lutwak told me about an uncle he had in Europe, who had suffered brutalities by the Nazis, and whom he and
733 his family wanted to bring to this country because he needed medical care and—

Q. Do you recall the name of the uncle that—

A. It was Leopold Knoll.

Q. Leopold Knoll. And do you recall anything else that Marcel Lutwak told you at that time and place?

A. He said he wanted a woman who had been in the service to marry this uncle and bring him to this country.

Q. Did he say anything else to you at that time and place?

A. Yes. He said he would pay one thousand dollars.

734 Q. Was there anything else said, that you can recall?

A. Well, that is about the substance of the conversation.

By Mr. Eben: I cannot hear. Will you please keep your voice up, Miss Osborne.

By Mr. Downing:

Q. Now, thereafter, did you have occasion to meet Regina Treitler.

A. Yes. I met her about one week later in her home.

Q. Where did you meet her?

A. In her home.

Q. Who was present at that time and place?

A. There were two sisters of Mrs. Treitler, Mania and Marcel. There were others, whom I do not recall.

Q. Did you have any conversation—

By the Court: Just a minute. I am not clear who was there.

By Mr. Downing: There were two sisters of Mrs. Treit-

ler, she said, Mania, Marcel and Mrs. Treitler, and others she did not recall.

By the Court: Now, Marcel who?

By the Witness: Marcel Lutwak.

735 By Mr. Downing:

Q. Marcel Lutwak, that is the defendant in the court room?

By the Court: Mania who?

By the Witness: I did not know her name at that time, her last name is Knoll.

By the Court: What?

By the Witness: Mania Knoll.

By Mr. Downing: That is the Mania who testified previously.

By the Court: Mania, who has already testified?

By Mr. Downing: That is right.

By the Court: Mania Knoll, is that it?

By the Witness: Yes, sir.

By the Court: Where was this, in Chicago?

By the Witness: At Mrs. Treitler's home.

By the Court: All right.

By Mr. Downing:

Q. Do you recall where Mrs. Treitler's home is, or was at that time?

A. On Central Park avenue near Madison.

Q. Central Park near Madison in Chicago?

A. Yes, sir.

736 Q. Now, will you relate any conversation you had at that time and place concerning this matter about which you have testified you had a conversation with Marcel Lutwak?

By Mr. Gerber: Objected to, in addition to my previous objection, Munio Knoll was not present.

By the Court: Overruled.

By Mr. Eben: The same objection as to Leopold.

By the Court: Overruled.

By the Witness:

A. Mrs. Treitler told me about her brother who she would like to move to this country. She said they had been supporting him in Europe, and he was badly in need of medical care, and she told me about all the sufferings that he had endured, and she and her family wanted very much to bring him here so that he could have proper attention. And she wanted someone to go to Europe to

marry him, a woman who had been in the service, and bring him to this country.

By Mr. Downing:

Q. Did she discuss anything about any terms in connection with going to Europe at that time?

A. I don't recall.

Q. Now, thereafter, did you have occasion to meet and talk with Marcel Lutwak?

A. Yes, sir.

737 By Mr. Eben: Same objection.

By the Court: Overruled.

By Mr. Downing:

Q. Approximately how long after this meeting at Regina Treitler's house did you have occasion to talk to the defendant Marcel Lutwak again?

A. It might have been about two or three weeks after my visit at Mrs. Treitler's.

Q. Where did you meet Marcel Lutwak at that time?

By Mr. Gerber: Your Honor, I would like to ask that some specific or reasonable date be fixed.

By Mr. Downing:

Q. Approximately when would you say this conversation you have reference to took place, two or three weeks after the meeting at Mrs. Treitler's?

A. It was about the last week of September, 1947.

Q. Do you recall where this conversation took place?

A. I had lunch with Marcel at a restaurant down on Dearborn and Jackson.

Q. Dearborn and Jackson, here in Chicago?

A. In Chicago.

Q. Anybody else present at that time and place?

A. No.

738 Q. Now, will you relate anything that was said at that time by Marcel or yourself, concerning this matter?

By Mr. Eben: Objection on behalf of Leopold Knoll.

By the Court: Overruled.

By Mr. Gerber: Objection on behalf of Munio Knoll.

By the Court: Overruled.

By Mr. Sokol: The same on behalf of Mrs. Treitler.

By the Court: Overruled.

By Mr. Downing:

Q. Proceed.

A. They were just matters concerning the trip to Paris. They were speaking about having me take my service papers to France, and the means of transportation, my going there with Mrs. Treitler, and the necessary shots that I would have to have before leaving this country, things of that nature were discussed.

Q. Do you recall anything more specifically that you discussed, other than what you have mentioned?

A. Well, on one of these visits, about two weeks before I left for Paris, I visited Marcel at his office, and we had a Coke together in the accompanying lunch room, and he told me he had another brother—

By Mr. Eben: Objected to on behalf of Leopold Knoll.

By the Court: Overruled.

By Mr. Gerber: Objected to on behalf of Munic Knoll.

By the Court: Overruled.

By Mr. Downing:

Q. Go ahead.

A. He had another uncle who was in similar straits as his uncle Leopold, and furthermore, that his uncle had been married, and his wife was in this country and they wanted to bring about a reunion between this uncle and former wife, and he asked if I would marry the second uncle Zygmunt, rather than Leopold.

Q. Is that the first time you had heard about Zygmunt?

A. That is the first time.

Q. All right. Was there anything else that was said?

A. He asked me how much money I wanted for making this trip and marrying the uncle.

Q. What did you say?

740 A. I said I would like to have enough to cover my expenses.

Q. What did Marcel say about that?

A. He asked me what that would be. I said I would rather wait until after the trip. I could tell better at that time what my expenses might be. But he asked that I name a figure, and I said \$250. He raised it to \$500, and asked me if that would be enough, and I agreed.

Q. All right. Now, was there any further discussion about the details of the trip that you can recall?

A. Nothing except that I would fly and all of my expenses would be taken care of in Paris.

Q. Was there anything else that you can recall now that you discussed with Marcel Lutwak?

A. Well, I had mentioned at the luncheon this was—

Q. This was back at the luncheon of Regina Treitler's?

A. Yes, sir, that I did not have clothes. I did not have clothes to wear for the trip, and I was told to buy what

Q. By whom were you told?
I needed.

A. By Mrs. Treitler.

741 Q. Thereafter did you buy some clothes?

A. Yes, sir.

Q. Did you receive money for the payment of those clothes?

A. I received money from Marcel.

Q. Approximately how much was that, do you recall?

A. \$100.

Q. In relation to when you left, approximately when was that, that you received the \$100, prior to the time you left?

A. It was about a month before, or three weeks to a month before.

Q. Three weeks to a month before you left?

A. Before the trip.

Q. Now, prior to taking your trip, madam, did you receive your ticket?

A. I received no ticket until—

Q. Did you make any payment of any of your money for a ticket to Paris, France?

A. No, I did not.

Q. Prior to the time you left, did you make out an application for a passport to leave the United States?

A. I did.

Q. Where did you make out that passport applica-
742 tion?

A. In this building.

Q. Was there anyone with you at that time and place?

A. Marcel it was.

Q. Was he the only one that was with you at that time and place?

A. He was the only one.

Q. Approximately how long was that before the time you left?

A. That was about two months before.

Q. Did anyone sign the passport application as your identifying witness?

A. Marcel did.

Q. Now, I believe you mentioned earlier in your testimony, concerning a statement of Marcel Lutwak, about your being in the service. Did you take your Navy honorable discharge certificate with you?

A. He asked that I take it with me.

Q. And you did take it with you to Paris?

A. Yes, I did.

Q. Did you take with you your divorce papers?

A. Yes, I did.

Q. Who asked you to take those with you?

A. Marcel did.

743. Q. Now, after this meeting at Regina Treitler's that you have mentioned, did you have occasion to discuss this same matter with Regina Treitler prior to the time you left Chicago?

A. I did not see Regina Treitler again until the day of our departure.

Q. Do you recall what date that was, madam?

A. It was October 25, 1947.

Q. From where did you leave?

A. We left from the Municipal Airport, Chicago.

Q. Who was with you at that time when you left Chicago?

A. There was Munio Knoll, Marcel Lutwak, and other members of that family, whose names I do not recall.

Q. Now, do you recall what airline it was that you left Chicago on?

A. It was a TWA.

Q. After you left Chicago, where did you disembark from the plane?

A. At Paris, France.

Q. Approximately how long did it take you to go from Chicago to Paris, France, do you recall?

A. About twenty-seven hours.

Q. So that you arrived in Paris some time on the 744 second day, was it, following your leaving?

A. Yes, sir.

Q. Now, at the time you arrived in Paris, France, did anyone meet you and the defendant Regina Treitler?

A. Zygmunt Romankiewicz and Bernard Wireberg.

Q. After you left the airport, where did you go?

A. I went to the le Khedive Hotel in Paris.

Q. Is that where you resided while you were in Paris?

A. Yes, sir.

Q. Under what name did you register?

A. Under the name of Bess Osborne.

Q. If you know, at what hotel did the defendant Regina Treitler reside while she was at Paris?

A. At the le Khedive.

Q. Did you share any room with the defendant Regina Treitler?

A. No, I had my own room.

Q. At that time, do you know where Zygmunt Romankiewicz was residing in Paris?

A. He was at the same hotel.

Q. Then do you recall the date of this marriage ceremony in November?

A. November 3rd.

745 Q. In connection with the marriage ceremony, will you tell the Court and jury what took place with respect to the arrangement while you were in Paris prior to the ceremony?

By Mr. Eben: I object to that on behalf of Leopold Knoll.

By the Court: Overruled.

By the Witness:

A. Well, Zygmunt and I went to a lawyer's office in Paris, and the secretary there made all the arrangements. She filled out the necessary papers, and I signed whatever was necessary, and then we went through the American Consulate there. She took care of all the papers and made all the arrangements, and I just signed the papers.

By Mr. Downing:

Q. Now, at the time of the marriage ceremony, did you obtain a wedding ring of any description from the defendant Zygmunt Romankiewicz?

A. No.

Q. Have you since that date obtained a wedding ring of any type from Zygmunt Romankiewicz?

A. No.

Q. Your answer is no?

A. No.

746 Q. After the marriage ceremony, where did you reside in Paris?

A. I remained at the le Khedive Hotel until November 9th, or about that time, and from there I moved to the Royal Monceau Hotel in Paris.

Q. Subsequent to the marriage ceremony and while you were living at the le Khedive Hotel in Paris, with whom did you live?

A. I lived by myself.

Q. While you were living at the Royal Monceau Hotel, in Paris, prior to the time of your departure therefrom, with whom did you live?

A. By myself.

Q. Now, after participating in the marriage ceremony with the defendant Zygmunt Romankiewicz, how long did you remain in Paris?

A. I remained there about five to seven days.

Q. Do you recall approximately what day it was you left Paris?

A. I left Paris on the 12th of November.

Q. November 12th? This was still in 1947?

A. 1947.

Q. While you were in Paris, did you have any conversation with the defendant Regina Treitler concerning
747 the matter you had discussed prior to the time you left Chicago?

A. She mentioned—

By Mr. Eben: Objected to on behalf of Leopold Knoll.

By the Court: Overruled.

By the Witness:

A. She mentioned on two or three occasions that I would receive one thousand dollars.

By Mr. Gerber: Objected to on behalf of Munio Knoll and ask that it be stricken, your Honor.

By the Court: Overruled. Denied.

By Mr. Downing:

Q. Was there anyone else present at the time you had this conversation with Regina Treitler?

A. I don't recall.

Q. All right. Now, while you were in Paris, France, in November, 1947, after the marriage ceremony that you have related, did you attend another marriage ceremony?

A. I attended the marriage ceremony of Grace Klemner to Leopold Knoll.

Q. When did you first see Leopold Knoll?

A. I met him the day of my arrival.

748 Q. The ceremony that you also attended was between Grace Klemtner and Leopold Knoll, is that right?

A. Yes, sir.

Q. Do you recall approximately what date that was?

A. November 1st, 1947.

Q. When did you first see Grace Klemtner?

A. I met her on the morning of November 3, 1947.

Q. Did she attend the marriage ceremony that you went through with Zygmunt Romankiewicz?

A. No.

Q. Now, at the time of this marriage ceremony between Leopold Knoll and Grace Klemtner, who else was present?

A. Zygmunt Romankiewicz.

Q. And yourself?

A. And myself.

Q. Where did that marriage ceremony take place? Was that at the same place that your ceremony took place?

A. Yes.

Q. Now, this Leopold Knoll that you have mentioned, is that the defendant Leopold Knoll you see in the court room?

A. Yes.

749 Q. During the time you were in Paris in November, 1947, were you acquainted with where Grace Klemtner resided?

A. Yes, sir.

Q. Where did she reside at the time you first met her?

750 A. At the le Khedive.

Q. Thereafter, did she reside at any other hotel?

A. Yes, she resided at the Royal Monceau.

Q. Do you know approximately when she commenced to reside at the Royal Monceau?

A. About three or four days after her marriage.

Q. Was that on or about the time you moved to the Royal Monceau?

A. I moved there about three days after Grace did.

Q. Were you acquainted with the room that she used at the Hotel Royal Monceau?

A. We had adjoining rooms.

Q. Did anyone else to your knowledge share her room?

A. Not to my knowledge.

Q. While you were living at the Royal Monceau, to your knowledge, did the defendant Leopold Knoll reside at the Royal Monceau?

By Mr. Eben: To her knowledge, she cannot tell us. It is an ambiguous question. They had adjoining rooms. Apparently any answer would meet the occasion, unless she policed all the rooms in the hotel in a kind of house detective fashion and it is prejudicial.

By the Court: You may cross examine her. You may answer, Madam.

By Mr. Downing: Will you read the question?

(Question read.)

By the Witness:

A. No.

By Mr. Downing:

Q. Now, prior to the time you left Chicago, did you have any discussions with anyone concerning how long this marriage that you were to go through would last?

A. Yes. Marcel Lutwak told me that in six months I could have a divorce.

By Mr. Gerber: Objected to and move it be stricken as to Munio Knoll.

By the Court: Denied.

By Mr. Eben: Also as to Leopold Knoll, your Honor.

By the Court: Denied.

By Mr. Downing:

Q. Where did you have this conversation with the defendant Marcel Lutwak?

A. This was during our first conversation at the place of business of Mrs. Anne Zapler.

752 Q. That is the time you previously related as having a conversation, is that right?

A. Yes, sir.

Q. And I believe you stated you left Paris on November 12, 1947, is that right, ma'am?

A. That is right.

Q. With whom did you leave?

A. I left with Zygmunt Romankiewicz.

Q. How did you leave?

A. We left by plane.

Q. For where?

A. For Brussels, and from there to the United States.

Q. Did you purchase either your ticket or that of the defendant Zygmunt Romankiewicz for the trip between Paris and Chicago?

A. No, I did not.

Q. At what port did you enter into the United States?

A. New York.

Q. Approximately what day, do you recall?

A. November 13, 1947.

Q. With whom?

A. With Zygmunt Romankiewicz.

753 Q. Mrs. Osborne, I show you Government's Exhibit 2 in evidence and ask you to look at that, and ask you if you have seen that before?

A. Yes, I have seen this before.

Q. When did you first see that, as best you recall?

A. It was at the port of entry in New York.

Q. Were you present when that document was filled out?

A. Yes; I was.

Q. Who else was with you at that time and place?

A. Zygmunt Romankiewicz.

Q. Now directing your attention to the signature on the document, I ask you, were you present when that signature on the line with the printing, "Signature of alien", were you present when that signature was placed thereon?

A. Yes.

Q. By whom was that placed thereon?

A. By Zygmunt Romankiewicz.

Q. I ask you if this document was prepared in connection with the entry of Zygmunt Romankiewicz into the United States?

A. Yes, sir.

Q. Now directing your attention to Government's
754 Exhibit 1, marked for identification, and with respect to that portion of it entitled, "Information Sheet," I ask you to look at that and ask you if you have seen the original of that before, ma'am?

A. Yes, I have.

Q. Approximately when did you first see the original of that document?

A. At the port of entry, New York.

Q. I ask you who was present at the time that was prepared.

A. Zygmunt Romankiewicz and myself.

Q. I ask you if this document was prepared in connection with the entry of Zygmunt Romankiewicz into the United States?

A. It was.

Q. Now, at the time these documents I have just shown you were filled out, was your Navy honorable discharge certificate examined by the Immigration Inspector who was present?

A. Yes.

Q. After reaching New York on November 13, 1947, where did you next go?

A. Zygmunt and I took a plane to Chicago.

Q. Did you pay for the tickets?

755 A. No, I did not.

Q. When did you reach Chicago then?

A. We reached Chicago on the night of November 13, 1947.

Q. Where did you reach Chicago at that time?

A. Chicago Municipal Air Port.

Q. Do you recall if anyone met you at the Chicago Municipal Air Port at the time you and the defendant Zygmunt Romankiewicz reached there?

A. There was Marcel Lutwak, Mania Knoll and there were others whose names I cannot recall.

Q. After you reached the air port then, will you tell the court and jury what happened?

A. Well, Marcel and I took a cab to the Bellaire Hotel in Chicago. Zygmunt and his people took a cab elsewhere. I don't know where they went.

By Mr. Eben: I would like the record to show, may it please the Court, my continuing objection to any events or declarations or acts occurring after the arrival in the United States.

By the Court: Overruled.

By Mr. Sokol: Similar objection for Mrs. Treidler.

756 By the Court: Overruled.

By Mr. Downing:

Q. Then after reaching the Bellaire Hotel, did you reside there for a short period of time?

A. Yes, I did.

Q. Did anyone reside with you at that place?

A. No.

Q. Now, when did you next see the defendant Zygmunt Romankiewicz?

A. I saw him about three days after our arrival here.

Q. Who else was present?

A. Marcel Lutwak.

Q. Where did you see the defendant Zygmunt Romankiewicz and Marcel Lutwak?

A. We met at the Admiral Restaurant on Dearborn Street near Madison.

Q. Here in downtown Chicago?

A. In Chicago.

Q. About what time of the day was that, do you recall?

A. It was in the afternoon.

Q. Who notified you of that particular meeting?

A. Well, at the time I am talking—

757 By Mr. Gerber: I object to the form of the question. It presupposes something, and it is leading. It presupposes that somebody had invited her. I think she ought to tell in her own way what happened.

By the Court: How did you happen to go there, Madam?

By the Witness: Marcel and myself arranged the meeting at the time of my arrival.

By Mr. Downing:

Q. Was that after you had seen Marcel, after you arrived here in Chicago that you arranged the meeting?

A. Yes, sir.

Q. Now, after you reached the Admiral Restaurant, will you tell the court and jury what took place there?

A. There it was arranged to give me a check for my participation in the marriage with Zygmunt Romankiewicz.

Q. Was a check given to you at that time and place?

A. Yes, it was.

Q. Who gave you that check?

A. Marcel Lutwak.

Q. That is the defendant Marcel Lutwak you see in 758 the court room?

A. Yes, sir.

Q. Who else was present?

A. There were no others.

Q. Besides Zygmunt Romankiewicz, he too was present?

A. Zygmunt Romankiewicz and Marcel and myself.

Q. Was the defendant Zygmunt Romankiewicz present at the time the check was given to you by the defendant Marcel Lutwak?

A. Yes, sir.

Q. Do you recall who signed the check?

A. Marcel Lutwak.

Q. Do you recall on what bank?

A. The First National Bank of Chicago.

Q. Do you recall the amount of the check?

A. One thousand dollars.

Q. Thereafter what did you do with the check?

A. I cashed it.

Q. Did you cash it on or about the same date?

A. About the same date.

Q. For what purpose was the check for one thousand dollars given to you?

By Mr. Eben: Objected to. It calls for a conclusion.

759 By the Court: What if anything was said about the check?

By the Witness: Well, it was understood—

By the Court: What was said?

By Mr. Eben: That is objected to.

By Mr. Gerber: Objected to.

By the Court: Tell us what was said.

By the Witness: He said it was for my participating in the marriage.

By Mr. Downing:

Q. By whom was that said?

A. I don't recall.

Q. Was it said at this particular time?

A. It was not said at that particular time.

By Mr. Eben: Now may I ask that that be stricken?

By Mr. Gerber: I object, and ask that it be stricken.

It was not said at that time, she said.

By the Court: Let us find out when it was said.

By Mr. Owen: She didn't recall who said it, if the Court please.

760 By the Court: Overruled. Find out when it was said.

By Mr. Downing:

Q. When was this said, to the best you recall?

A. While I was in Paris, Mrs. Treitler said that she would see—

By Mr. Gerber: I object to this, if your Honor please, unless he fixes a time and place of the conversation and who was present so we can make a proper objection to it.

By the Court: Find out the time and place.

By Mr. Downing:

Q. When did you have this conversation with Regina Treitler?

A. It was while I was in Paris.

Q. Sometime while you were yet in Paris?

A. During the ten-day period while I was in Paris.

Q. All right, anybody else present?

A. I don't recall.

Q. Tell us what was said at that time and place.

By Mr. Eben: I object to that, your Honor.

By the Court: Overruled.

761 By Mr. Gerber: Object on behalf of Munio Knoll.

By the Court: Overruled.

By the Witness:

A. She said, "I will see you get one thousand dollars."

By Mr. Downing:

Q. Now, did you have a conversation about this same matter with the defendant Marcel Lutwak on the way from the air port to the Bellaire Hotel?

A. Yes, I did.

762 Q. Can you relate in substance what that conversation was? What did Marcel say and what did you say?

By Mr. Gerber: I object on behalf of Munio Knoll, outside of his presence.

By the Court: Overruled.

By Mr. Weissbourd: Same objection for Leopold Knoll.

By the Court: Overruled.

By the Witness:

A. I told him what Mrs. Treitler had said in Paris, and he agreed to see that I was given one thousand dollars.

By Mr. Downing:

Q. And thereafter you did receive this check about which you have previously testified, is that right?

A. Yes, I did.

Q. Since November 3, 1947, have you ever lived as man and wife with the defendant Zygmunt Romankiewicz?

A. No.

Q. Did you ever reside with Zygmunt Romankiewicz as man and wife at 35 South Central Park in Chicago, Illinois?

A. No.

763 Q. Have you filed any action to sever the effects of the marriage ceremony you participated in in Paris?

A. Yes.

Q. Approximately when?

A. It was filed May 3, 1950.

Q. Has there been any final ruling in connection with that matter as of this date?

A. No.

Q. Since the meeting in November at the time the check was paid to you have you had occasion to talk to the defendant Zygmunt Romankiewicz, since that time?

A. Yes, I did.

Q. Approximately when did you first talk to him after that particular meeting, as best you recall?

A. It was about six months after the marriage, and—

Q. Where did you talk to him?

A. I talk to him at the office of Joseph Honoroff:

Q. Is he an attorney at law?

A. He is an attorney.

Q. Who else was present at the time you talked with the defendant Zygmunt Romankiewicz?

A. Joseph Honoroff was present.

Q. Will you tell us in substance what was said
764 either by the defendant Zygmunt Romankiewicz, Joseph Honoroff or yourself?

By Mr. Eben: Objection on behalf of Leopold Knoll.

By the Court: I suspect it will be admissible only against Zygmunt Romankiewicz. It will be received as against Zygmunt Romankiewicz. If afterwards you think it is admissible against the others, you so indicate, and I will rule.

By Mr. Downing: Yes.

By Mr. Downing:

Q. Will you tell tell court and jury what was said at that particular time and place?

A. I asked when action would be taken for divorce, and Zygmunt asked me if I would wait two years because he wanted to become an American citizen, and it would take that long, and I agreed to wait.

By Mr. Downing: If your Honor please, I move that should be admissible against the whole—all four defendants. I think it is in furtherance of the conspiracy.

By the Court: Well, I think it is, too. It may
765 be received as against all of the defendants.

By Mr. Downing:

Q. Thereafter did you have occasion again to talk to the defendant Zygmunt Romankiewicz?

A. I talked to him about the middle of November of 1950.

Q. That is the past year, 1950, is that right?

A. Yes.

Q. Where did you talk to him then?

A. We had lunch at the Stevens Hotel, Chicago.

Q. Was anyone else present at that time and place?

A. No.

Q. Will you relate the substance of the conversation if any that you had about this same matter at that time and place?

By Mr. Sokol: I object also. I believe this was after the indictment.

By the Court: I suspect this is admissible only against Zygmunt Romankiewicz and it will be received against him, unless afterwards it is recited you think it is admissible against all, then you make a motion and I will rule on it.

By Mr. Downing:

766 Q. Will you relate in substance what was said at that particular time and place?

A. I asked him not to oppose my action for divorce, and he said he would like me to wait until after this trial.

Q. And was there any further discussion about it at that particular time and place?

A. No, there was not.

By Mr. Downing: If your Honor please—

By the Court: That is admissible against Zygmunt. It will be received against Zygmunt and against none of the others. You are not to consider it against any of the other defendants.

By Mr. Downing:

Q. Since November 3, 1947, have you ever used the name of Romankiewicz or Knoll?

A. No.

Q. Since November 3, 1947, was the marriage between you and defendant Zygmunt Romankiewicz ever consummated?

A. No.

Q. Since November 3, 1947, has the defendant Zygmunt Romankiewicz ever paid or provided for your support?

767 A. No.

Q. Since November 3, 1947, have you ever at any time lived as man and wife with the defendant Zygmunt Romankiewicz?

A. No.

By Mr. Downing: That is all. They may cross examine.

By Mr. Gerber: At the conclusion of it I again move to strike all this testimony, for the previous reasons given, incompetency—

By the Court: Denied.

By Mr. Gerber: Without waiving any of my rights under the objection, and without prejudice to it, I would like to cross examine, your Honor.

Cross Examination.

By Mr. Gerber.

Q. You have given the name of Bess Osborne when you took the stand, is that correct?

A. Yes.

Q. Isn't your name Bess Romankiewicz?

A. Well, according to our understanding—

Q. Isn't your name—

768 A. I wasn't to use that name.

Q. Isn't that your name now?

A. No, it is not.

Q. You don't consider it so?

A. I do not consider it as my name.

By Mr. Gerber: Mark this Munio Knoll's Exhibit A for identification.

(Document so marked for identification.)

By Mr. Gerber:

Q. I show you what has been marked Exhibit A for identification of Munio Knoll, and ask you if you know what that is?

A. Yes, I do.

A. It is a marriage certificate.

Q. And whose marriage does that certify to?

A. It is a marriage between Zygmunt Romankiewicz and myself.

Q. On what date does it certify that marriage took place?

By Mr. Downing: Let the record show—

By Mr. Gerber: Withdraw that question.

By Mr. Downing: The exhibit is in French.

769 By Mr. Gerber:

Q. Was this the marriage certificate which was issued to you and Mr. Romankiewicz in Paris?

A. Yes.

Q. At the time you got married?

A. Yes.

Q. And was this a certificate under which you were married and was issued to you at the time?

A. Yes.

Q. And you celebrated this marriage with a ceremony, did you?

A. There was a marriage ceremony at the City Hall.

Q. Right.

By Mr. Gerber: Your Honor, I offer the certificate now.

By the Court: It may be received.

(Said document was received in evidence by the Court, and marked Defendant Munio Knoll's Exhibit A.)

By Mr. Gerber:

Q. I shew you what has been marked as Government's Exhibit 2 for identification, which you already identified, and ask you to look at it.

770 In connection with that particular exhibit—is that not the application for admission into this country of Zygmunt Romankiewicz?

A. Yes.

Q. You saw that for the first time when the two of you arrived at New York by plane, is that correct?

A. Yes.

Q. And that was in the office of the Immigration office at the air port, was it?

A. Yes.

Q. And they interrogated you for quite some time when you arrived, did they not?

A. I do not recall how long it was. It might have been from a half an hour to an hour.

Q. And you were the one they talked to, because he was illiterate, is that right?

A. They talked to him as well as me.

Q. Who talked to him?

A. I don't know what his title is, the man who made up these papers.

Q. Zygmunt was illiterate, wasn't he?

By Mr. Downing: Objection to the classification as illiterate.

By Mr. Gerber:

Q. Zygmunt couldn't read or write or understand 771 English, could he, at the time, Miss Osborne—Mrs. Romankiewicz?

A. This man could speak German.

Q. The man at the Immigration office?

A. Yes.

Q. Is that the man who signed that?

A. I can't tell you.

Q. At the end of your interview with the Immigration official Zygmunt was called over and asked to sign that, is that correct?

A. Yes.

Q. What was it, a room there?

A. It was.

Q. And when he was interrogating you you were at his desk, is that right?

A. Yes.

Q. And Zygmunt was sitting on the other side of the room, isn't that right?

A. He might have been.

Q. Yes. And when he got through, the Immigration officer got through interrogating you, was he filling out that form at the time or was it already filled out?

A. This form was already filled out, I believe. 772 He probably got some of this information from Zygmunt, because I couldn't have given it because I didn't know where Zygmunt was born, or when.

Q. But the Immigration Officer filled that out in his handwriting, isn't that correct?

A. Yes.

Q. And after he had talked to you for a while Zygmunt was called over and got this information, and you were there at the time, I believe.

A. I was.

Q. He got the information that was written in in red ink from him, is that correct?

A. Yes.

Q. And he asked Zygmunt to sign it?

A. He asked him to sign it.

Q. As a matter of fact, Miss Osborne, the Immigration Officer did not take the time to read that entire thing to Zygmunt, did he, with the printed matter and all?

A. I don't know whether he did or not. I can't recall.

Q. You can't recall that?

A. Whether he did read it.

Q. You wouldn't say one way or the other, is that
773 right?

A. Well, I don't remember.

Q. You have stated, Mrs. Romankiewicz, that you never lived with Zygmunt at any time after the marriage ceremony was performed.

A. No, I did not.

Q. Have you ever told anyone else that you lived with him as man and wife?

A. I have never told anybody that I have.

Q. Have you ever made a statement under oath to that effect?

A. That I have lived with him?

Q. After you married him, yes.

A. No, I do not recall that I have.

Q. Well, have you or haven't you?

A. I do not recall that I have.

Q. You understand the meaning of an oath, do you not?

By Mr. Downing: I object.

By the Court: There is no occasion for that, Counsel. Now you proceed with your cross examination. No occasion for that remark.

By Mr. Downing: I ask it be stricken.

774 By the Court: Strike it out.

By Mr. Gerber:

Q. You have stated on direct examination you filed a bill for divorce, is that correct?

A. I have.

By Mr. Gerber: Mark this Defendant Munio Knoll Exhibit B for identification.

(Document so marked for identification.)

By Mr. Downing: May I see it first, before you show it to her?

By Mr. Gerber: Yes.

By Mr. Gerber:

Q. I show you now Defendant Zygmunt Romankiewicz Exhibit marked B for identification, and ask you to look at it.

A. I have never seen this before. I have signed my name. I just didn't read it. If I had, I wouldn't have signed it.

Q. Your lawyer prepared this?

A. All I saw was this last sheet.

Q. Do you know what it is, from looking at it?

A. Yes, I do.

Q. What is it?

775 A. It is a bill for divorce.

Q. Prepared by your lawyer?

A. Yes.

Q. I direct your attention to page 2 of the exhibit and ask you whether that is your signature?

A. That is my signature.

Q. I direct your attention to page 3 of the exhibit and ask you whether that is your signature?

A. Yes, it is.

Q. Were you sworn by a notary public at the time you signed it?

A. No, was not.

Q. Is there a notary's seal on it?

A. There is a notary's seal on it.

Q. Does it say you were sworn at the time you signed your name?

A. All I did was sign it.

Q. Will you please answer the question?

By Mr. Downing: I object. She answered that question.

By the Court: Sustained.

By Mr. Downing: I ask that be stricken.

By the Court: Strike it out. She answered it.

776 By Mr. Gerber:

Q. Did you sign it?

A. I did sign it.

Q. And it states you swore to it?

A. Yes.

By Mr. Downing: I object, repetition.

By the Court: It speaks for itself.

By Mr. Gerber:

Q. It states there further that you read it before you signed it?

By Mr. Downing: I object. It speaks for itself.

By Mr. Gerber: I am asking another question.

By the Court: Well, it speaks for itself. It is a written document.

By Mr. Gerber: I ask leave to offer this in evidence, your Honor.

By the Court: Yes, it may go in evidence.

By Mr. Gerber: And I ask leave to read it to the jury.

By the Court: You can read it. Conclude your cross examination and then you can read it.

734. (Said document was received in evidence by the Court, and marked Defendant Munio Knoll Exhibit B.)

By Mr. Sokol: I was going to ask for a recess, if we might have a few minutes.

By the Court: How much longer will your cross examination take?

By Mr. Gerber: Possibly ten or fifteen minutes.

By the Court: Take a short recess, Ladies and Gentlemen.

You may step down, Madam, if you like.

(Recess taken.)

By Mr. Gerber:

Q. Mrs. Romankiewicz, is it not a fact that in Paris prior to your marriage to Zygmunt that you and Zygmunt had a conversation in which he asked you whether you meant this marriage and whether you two couldn't live together and wouldn't live together if the marriage was had, and isn't it a fact that you answered, "Yes," when he asked you that?

A. I do not recall any such conversation.

Q. Would you say that it didn't occur?

A. I would say that it did not occur.

778. By Mr. Gerber: That is all of this witness, your Honor.

By the Court: Very well.

By Mr. Eben: I have a rather brief cross examination.

By Mr. Gerber: I want to reserve my right to read this exhibit when we are through.

By the Court: Very well.

379

Cross Examination by Mr. Eben.

Q. Mrs. Romankiewicz—do I pronounce it correctly?

A. I don't know.

Q. You were present at the marriage between my client, Mr. Leopold Knoll, and the then Grace Klemtner, were you not?

A. Yes.

Q. That took place in Paris, did it not?

A. Yes.

Q. Do you recall the approximate date?

A. November 6, 1947.

Q. Prior to that time you had met Leopold Knoll in Paris, had you not?

A. Yes, I had.

Q. And Grace Klemtner was also there, was she not?

A. She was there in Paris.

Q. Prior to her marriage. A conversation took place, did it not, at the le Khedive Hotel in Paris between Leopold Knoll and Grace Klemtner at which you were present, isn't that right?

A. There were several conversations.

Q. At one of those conversations, did not Grace
780 Klemtner say to Leopold Knoll, in your presence, that she did not know whether she was going to go ahead with this marriage, or not?

A. Yes.

Q. And at that time didn't Leopold Knoll say to her, "If you do not intend to marry me and stay married to me, and if you have only come over here to marry me for the purposes of getting me into the United States, and if it is for that purpose only, then you go back home, I do not want to marry you?"

A. I believe that did take place.

Q. All right. Leopold Knoll said that to Grace, didn't he?

A. Yes.

Q. Now, then, Grace left the room in which that conversation took place?

A. I do not recall.

Q. Do you recall Grace saying at that time that she wanted to think it over?

A. I do not recall that, either.

Q. Excuse me.

A. I don't recall whether she did say that.

Q. After Mr. Leopold Knoll made that statement, that he would not marry Grace if she was there only for the purpose of getting him into the United States and that he would only marry her if she intended to live with him permanently as husband and wife, did Grace then say that she would marry him?

A. I don't know whether it was at that time she did, but she did say she would marry him.

Q. When did you first tell the story that you have told here this morning to the Immigration and Naturalization Service?

A. The exact date, is that what you want?

Q. Approximately?

A. I don't know the exact date, but I believe it was in November of 1949.

Q. Did they ask you to come over to their office or did they visit you where you worked or where you resided?

A. They came to my office.

Q. And do you recall who they were in that particular instance?

A. Mr. Lawson and Mr. Plzak.

Q. Mr. Plzak?

A. Mr. Plzak.

Q. And Mr. Lawson, did you say?

A. Yes.

782 Q. When you say Mr. Lawson, were you indicating the gentleman who has been sitting back of Mr. Downing?

A. Yes, sir.

By Mr. Downing: We will stipulate to that.

By Mr. Eben:

Q. And at that time did they interrogate you relative to what had happened in connection with your marriage to Mr. Romankiewicz?

A. Yes.

Q. Did you thereafter testify before the grand jury?

A. Yes.

Q. On how many occasions?

A. Two.

Q. Did you testify before the same grand jury on each occasion?

By Mr. Downing: Objection, whether she knows it was the same or a different one. I think it is immaterial.

By the Court: She may answer if she knows.

By the Witness:

A. I do not know if it was the same grand jury, but it was at different dates.

By Mr. Eben:

Q. Now, when Mr. Lawson first talked with you, 783 you did not tell him exactly the same story that you told here this morning, did you?

A. Well, I believe I told more details then.

Q. Of everything that you have testified to here this morning?

A. Not the first time. At the grand jury, yes, I did.

Q. At the grand jury?

A. Yes, exactly the same.

Q. But the first time that that he saw you, you did not tell him the same story as you have told it here this morning?

A. No.

Q. As a matter of fact, at that time you refused to tell them anything, isn't that true?

A. No, that is not true.

Q. You did not tell them at that time, did you, about the one thousand dollars?

A. I told them at that time that I received a gift of money.

Q. A gift?

A. Yes.

Q. In order to summarize this and not make it too lengthy, you were told by some representative of the 784 Government, either Mr. Lawson or Mr. Plzak, or somebody else, that if you didn't testify before the grand jury, that you would be indicted, isn't that true?

A. No, sir.

Q. Were any threats made to you at any time?

A. Never.

Q. Were you ever indicted?

A. Not to my knowledge.

Q. Did anyone connected with the Government ever tell you that if you did testify on behalf of the Government, that they would grant you immunity?

A. No, sir.

Q. Did anyone ever say anything like that?

A. No, they did not—it was my—

Q. What was that?

A. It was my own desire to tell the truth.

Q. After the Government came to see you, isn't that true?

A. I had told Mr. Honoroff before the Government officials ever came to see me, that I wanted to go to see them. I didn't know they were seeking me, and I told Mr. Honoroff I wanted to see them and tell them the truth, and Mr. Honoroff told me he would make an appointment for me, and on that same day on which he told me he had the appointment for me, the Immigration officials came to my office.

Q. Well, you knew at that time, when Mr. Honoroff—is it?

A. Yes.

Q. —talked with you, that the Government was conducting an examination?

A. Yes, I did.

Q. And it was only after you knew that the Government had been conducting an investigation that you expressed a desire to tell your story?

A. That is right.

Q. Prior to that time you had no such desire, did you?

A. No, sir.

By Mr. Eben: That is all.

By Mr. Sokol: I have a few questions.

Cross Examination by Mr. Sokol.

Q. Mrs. Remankiewicz, with respect to your trip over on the plane, you recall, do you not, discussing with some emotion with Mrs. Treitler, the unhappiness you had experienced in your first marriage?

786 A. I may have. I don't recall it.

Q. Do you recall that during that discussion, in which you mentioned this first marriage had been unhappy, that Mrs. Treitler told you that she hoped you would be happy with Zygmunt, her brother?

A. No, I don't recall that, because the understanding I had was that I was to marry Zygmunt only to bring about a re-union with he and his former wife.

Mr. Sokol: That is all.

By Mr. Downing: Any more cross-examination?

Redirect Examination by Mr. Downing.

Q. As a matter of fact, the understanding, was it not, Miss Osborne, the purpose of Zygmunt was further to bring him into the United States, is that right?

A. Yes. At the time it was arranged for me to marry Leopold, then it was said it might be a true marriage, and there might be romance involved. But not in the marriage with Zygmunt Romankiewicz.

Q. As a matter of fact, you originally were first requested to go over and marry Leopold, isn't that right?

A. Yes.

By Mr. Eben: I object to that question.

787 By the Court: Overruled.

By Mr. Downing:

Q. Mr. Eben asked you how you pronounced the name of Romankiewicz, or Romankiewicz. You don't actually know, because you have never used that name, is that right?

By Mr. Gerber: I object.

By the Court: Overruled.

By the Witness:

A. I haven't used that name, no, sir.

By Mr. Downing:

Q. That is correct. In connection with this marriage certificate, counsel has shown you here, which has been admitted in evidence as defendant Munio Knoll's Exhibit A in evidence, I ask you to look at that and ask you if on that document there is not mention of the fact that you were divorced from William Osborne—

A. Yes.

Q. I ask you in connection with that, is there any mention about the fact that Zygmunt Romankiewicz has been married or divorced?

By Mr. Owen: The document speaks for itself, if the Court please.

788 By the Court: Sustained. What is it, in English?

By Mr. Downing: No, it is in French.

By the Court: Does she read French?

By Mr. Downing:

Q. Do you read French?

A. I can read a little.

By the Court: Sustained.

By Mr. Downing: I submit, your Honor, in view of this, I don't see the relevancy of this document. It is in French. There has not been any interpretation offered.

By the Court: It won't do any harm.

By Mr. Gerber: It is admitted as proof of marriage, your Honor.

By the Court: No, I did not admit it for that purpose.

By Mr. Downing: Just as an exhibit.

By Mr. Gerber: That was my purpose in asking it be admitted, your Honor, was to evidence the marriage she testified about.

By Mr. Downing:

Q. Now, in connection with Defendant Munio Knoll Exhibit B, which was shown to you by Mr. Gerber, by whom was that prepared, if you know?

789 A. That was prepared by my lawyer, Mr. Jacobson.

Q. You didn't have anything to do with the preparation of it, is that right?

A. No; I did not.

Q. As a matter of fact, will you tell the Court and jury the circumstances under which you affixed your signature to this document? Tell us what took place at that time.

A. My lawyer called me and asked me to come over and sign some papers, and I did. His secretary handed me the papers that needed the signature. She handed it to me through a window, and I just signed it. I trusted my lawyer knew what he was doing.

Q. Had you ever told your lawyer you at any time cohabited with Zygmunt Romankiewicz?

A. No.

By Mr. Gerber: I object. The instrument speaks for itself.

By the Court: That isn't what he asked. He asked what she told her lawyer.

Overruled.

By Mr. Downing:

Q. Did you ever tell your lawyer—

A. No, he knew otherwise.

790 By Mr. Gerber: I object and ask it be stricken.

By the Court: Overruled.

By the Witness: He knew I had never lived with him.

By Mr. Downing:

Q. You had explained to your lawyer the entire circumstances and asked him to obtain a divorce for you, isn't that right?

A. Yes.

Recross Examination by Mr. Gerber.

Q. Your lawyer's name was Mr. Jacobson?

A. Yes.

Q. Which Jacobson was that?

A. Ralph.

Q. Located at 77 West Washington street, Chicago, is that correct?

A. Yes, sir.

Q. Didn't you have a discussion with him about the divorce grounds you claimed for divorce and about the case and about your marriage before he prepared this document?

A. I didn't talk to him about grounds. He knew 791 the case.

Q. Did you discuss with him then or at any other time the divorce and the grounds that you were going to claim for your divorce?

A. I never discussed the grounds with him.

Q. Did he ask you for certain facts upon which he could draw a divorce bill?

A. Yes, he asked me about the marriage.

Q. That is right, and you don't want us to believe that the lawyer drew this divorce bill and put in facts that you didn't tell him about, do you?

A. I don't know what facts are in there that he wouldn't know about or—

Q. All right.

A. He wouldn't assume. He, however, put facts into that document which I did not tell him to put in.

Q. I know you did not tell him to put it in, but you discussed those facts with him?

A. I discussed with him only the fact that I had never lived with Mr. Romankiewicz.

Q. Did he not tell you in your discussion about the divorce, that he would draw a bill for divorce and in that bill he would set forth the things you discussed?

792 A. No, he did not.

By Mr. Downing: I think, your Honor, this is going—

By Mr. Gerber: That is all.

Recross Examination by Mr. Eben.

Q. In response to a question that Mr. Downing put to you on redirect examination, did you say that your marriage

to Leopold would have been a true marriage, with romance?

A. That it could have been.

Q. That is all. By that you mean, had you married him?

A. Yes.

By Mr. Eben: That is all.

By Mr. Downing: That is all. You may step down.

(Witness excused.)

793 By Mr. Gerber: May I now proceed, your Honor?
Ladies and Gentlemen of the Jury, by the court's
permission I am now reading from Munio Knoll, alias
Zygmunt Romankiewicz, Exhibit B for identification, in the
record now:

796 By Mr. Downing: In order to expedite this matter,
I have a translation of this document which was ad-
mitted as Defendant Munio Knoll's Exhibit A.

797 By Mr. Downing: For the Court's information, this
translation is certified to be true and correct, by an em-
ployee of the Immigration and Naturalization Department.
The document itself is all in French.

By the Court: Any objection to the translation?

By Mr. Gerber: For what purpose, if your Honor please?

By the Court: So that the jury will know what it is.

By Mr. Gerber: Oh, no. I would like to look at it, if the
Court please. No objection.

By the Court: I understand there is no objection to the
translation being received in evidence.

By Mr. Gerber: That is right, and attached to the ex-
hibit.

By Mr. Downing: Will you attach it to the exhibit?

Mr. Gerber: I will attach it to the exhibit.

By Mr. Downing: If your Honor please, at this time
the Government would like to advise the Court there is a
witness, Grace Klemmtner, who is available to the Court.
The Government does not desire to place the witness on the
stand as their witness. I believe she has facts concerning
this entire matter.

798 By Mr. Eben: I think that such a statement should
be made out of the presence of the jury. I think it is
very improper for the District Attorney to make it.

By the Court: Step into the jury room, ladies and gentle-
men.

By Mr. Eben: It is almost grounds for a mistrial.

By the Court: Counsel, if you are making a motion,
make it so I can hear it.

By Mr. Eben: Excuse me. I did not make any motion.

By the Court: What?

By Mr. Eben: I say, I did not make any motion.

(The following proceedings were had out of the presence and hearing of the jury:

By the Court: What is it, now?

By Mr. Downing: If your Honor please, a person by the name of Grace Klemtner, alias Grace Klemtner Knoll, who it is alleged went through a marriage ceremony with the defendant Leopold Knoll, is available and is in the hall, and is a person who could be considered as a witness. The Government, however, will not vouch for her truthfulness and veracity. The Government does not desire to put her on the stand as a witness. The Government has, however, brought her from Los Angeles, and is now making a motion and asking the Court to call her as a court witness, with the right to cross examine on the part of the Government, and, of course, the defendant.

By the Court: Any objection?

By Mr. Eben: Certainly, oh, certainly.

By the Court: What is the objection?

By Mr. Eben: He has stated no valid grounds for calling the witness as a Court witness. The only possible ground that he could use her for calling her as a court witness is he was taken by surprise because of her direct testimony. He has stated no proper facts to permit the Court to call her for cross examination, so I say let him put her on and vouch for her credibility. He took her before the grand jury, and handled her there to the extent that your Honor had to discharge her months ago.

By the Court: No, I did not have to. The law required it.

By Mr. Eben: That is precisely what I mean.

By the Court: Well, you would have been more courteous to have put it that way.

By Mr. Sokol: I am sure Mr. Eben meant no discourtesy.

By Mr. Eben: I meant no discourtesy. The law is your Honor's master as much as it is ours, and I understand your Honor follows it.

By Mr. Downing: I might state one ground, as far as the Government is concerned, that we won't vouch for the truthfulness and veracity of this witness.

By Mr. Eben: Then they should not put her on.

By Mr. Sokol: Then they have no grounds for calling her.

By the Court: I think that society ought to hear what she has to say about it. She was a defendant in this lawsuit, and I thought that her constitutional rights had been invaded, and I discharged her, and I think rightfully. Still, the evidence discloses she was a witness to certain things in which the Court is concerned. I think the Court should call her as a Court witness, and that will be done, and each side may cross examine her. Bring in the jury.

By Mr. Eben: We have a further objection, your Honor.

By the Court: What is the further objection?

By Mr. Eben: Because she is not competent.

By the Court: Because of what?

801 By Mr. Eben: Because she is the wife, and still is the wife—

By the Court: We will pass that question. I think this marriage was a mockery. The evidence all indicates it. The jury can pass on it, and maybe they will say it is a valid marriage.

By Mr. Sokol: If the Court please, by the Government's own witness, who just left the stand—

By the Court: Oh, yes. We are not going into this question again. You are objecting because she is the wife of Leopold. I think the evidence indicates that the ceremony was a mockery. It was never intended to be anything else. Now the jury may decide otherwise.

By Mr. Eben: Well, I do point out, your Honor, under the authority of the Supreme Court, you should not pass to the jury as a question of fact something which you should decide because this witness is prima facie incompetent under the authority of the Miles case.

By the Court: I say she is not, under the state of the record. Bring in the jury.

By Mr. Eben: One other thing. I want to perfect my record. I want the record to show that I object to
802 her competency to testify against Leopold Knoll because she is his wife, and I want the record to show that I ask for voir dire examination.

By the Court: You may have the privilege of asking her anything.

By Mr. Eben: I do not think we ought to have the voir dire examination in the presence of the jury, if that is what your Honor means.

By the Court: No, it is not what I mean. All the evidence before us has indicated that she went through a mockery, made a mockery out of, a marriage ceremony. Now, it may not be true, and she may convince the jury otherwise.

By Mr. Eben: I would like, also, to register my objection to the Court calling her as a Court witness.

By the Court: Overruled.

By Mr. Sokol: Similar objection for Regina Treitler.

By the Court: Overruled.

By Mr. Gerber: We object to the Court calling her as a Court witness.

By the Court: Overruled.

By Mr. Eben: I would like also to state that she is now under subpoena issued by the Government.

By the Court: All right. Bring in the jury.

(The following proceedings were had in the presence and hearing of the jury:)

By Mr. Downing: Grace Klemtner.

By Mr. Eben: I suggest that she be referred to as Mrs. Knoll during the course of the examination. I think counsel should not try to plant some sort of inference with the jury regarding her name. She is the wife of Leopold Knoll.

By the Court: Have the young lady come in.

MRS. LEOPOLD KNOLL, called as a witness by the Court, having been first duly sworn, testified as follows:

By the Court:

Q. What is your name?

A. Mrs. Leopold Knoll.

Q. What is your first name?

A. Grace.

Q. Where do you reside?

A. At 116½ South Bonnie Brae, Los Angeles.

By the Court: How long have you resided there?

By the Witness: About three years.

By the Court: The Government may cross-examine.

804 *Cross Examination by Mr. Downing.*

Q. Have you ever been in the military service of the United States?

A. Yes, sir, I have. I served in the Army.

Q. Approximately from what date until what date?

A. October 16, 1943, until December, 1945.

Q. Did you receive an honorable discharge?

A. Yes, sir.

Q. After you were discharged from the Army, did you go to work for Sears, Roebuck & Company, ultimately?

A. Yes, I did.

Q. Approximately from what date until what date did you work there?

A. Oh, about a year and a half.

Q. What was the last date, approximately, that you worked at Sears, Roebuck?

A. I think it was October, 1947.

Q. As a matter of fact, it was about October 29, 1947, is that right, ma'am?

A. Just about.

Q. And, as a matter of fact, you took a leave of absence from Sears, Roebuck at that time, is that right?

A. Yes, I did.

805 Q. When did you send in your resignation, if ever?

A. When I arrived in Los Angeles, and I decided to remain there.

Q. That was about December 13th or 14th, 1947, is that right?

A. Yes.

Q. Now, you were making what, about \$50 a week, with Sears Roebuck?

A. Probably a little more.

Q. While you were working for Sears, Roebuck & Company, where were you living?

A. With my mother.

Q. What was your name at that time?

A. Grace Klemtner.

Q. That is your maiden name?

A. Yes.

Q. You have never had any other name besides Grace Klemtner?

A. No.

Q. Now, after you left Sears, Roebuck & Company about October 29, 1947, you went to Paris, France, is that right?

A. I did.

Q. You left on November 1, 1947, is that right, 806 madam?

A. It was approximately that time.

Q. It was on Saturday, wasn't it?

A. I don't remember.

Q. Well, it was late in the afternoon that you left, and Jane Turner was with you when you left, is that right?

A. Yes.

Q. She was out at the Chicago Municipal Airport in Chicago?

A. Yes.

Q. For what purpose did you take the trip to Paris?

A. Purely for vacation and rest.

Q. Did you make out a passport application?

A. Yes, I did.

Q. When did you make out this passport application?

A. I don't remember the date.

Q. Well, was it three months, three weeks or three days before you left?

A. It was probably a matter of a few weeks before I left.

Q. A matter of a few weeks before you left?

A. I am not certain.

Q. Where did you make out your passport application?
807

A. At the office here in Chicago.

Q. You thereafter obtained a passport, is that right?

A. Yes, I did.

Q. Now, you, of course, know these four defendants who are in this proceeding, is that right?

A. Yes, I did.

Q. And, of course, you can identify them in the courtroom?

A. Yes.

Q. When did you first meet Regina Treitler?

A. I have known Mrs. Treitler for many years.

Q. Well, approximately when was it you first met her?

808 A. It was before I went into the army.

Q. Sometime before 1943, is that right?

A. That is right.

Q. Now coming on up into 1947, were you seeing Mrs. Treitler frequently then?

A. No. Mrs. Treitler and I saw each other only at club meetings.

Q. What club was that?

A. The Pioneer Womens Organization.

Q. Now, how frequently would you say you saw Mrs. Treitler during the year 1947?

A. Perhaps three or four times a year.

Q. Prior to the time you went to Paris, when was the last time you saw her?

A. About a few weeks before she left.

Q. Did you know that she went to Paris about October 25th, is that right?

A. I know that Mrs. Treitler went on a trip to Europe.

Q. You know she did go?

A. Yes.

Q. You had a conversation with her about the fact that she was going, is that right?

A. Yes.

809 Q. And that conversation took place about a week or two before she left, is that right?

A. Maybe a little longer, a matter of weeks. I don't remember.

Q. It would not be much over a month or a month and a half?

A. No.

Q. Sometimes within a month or a month and a half before she left, is that right?

A. Yes.

Q. Did you have any conversation with Mrs. Treitler about the fact that you were going to Paris?

A. Yes, I did.

Q. Tell the court and jury what you told Mrs. Treitler and what she told you at that time.

A. Well, we both talked about going, and she said that she would make hotel reservations for me. That was all.

Q. You did not have hotel reservations before you left?

A. Yes, I did. I made one on my own accord.

Q. On your own?

A. Yes.

Q. Did Mrs. Treitler make a hotel reservation?

810 A. You mean for herself?

Q. For you?

A. She had a room for me when I got there.

Q. Did you tell Mrs. Treitler when you were coming to Paris?

A. I don't recall.

Q. Well, you met Mrs. Treitler in Paris, is that right?

A. I told her I was going.

Q. In fact, Mrs. Treitler was at the airport when you landed, is that right?

A. Yes, we met there.

Q. And Leopold Knoll was at the airport?

A. Yes.

Q. Anyone else present at that time?

A. No.

Q. How did Mrs. Treitler know that you were coming at that particular time and place?

A. I must have told her.

Q. So that you had told her in some way or other before she left, is that right?

A. I really do not recall.

Q. You don't recall how you informed Mrs. Treitler that you were leaving on November 1st and arriving at such and such a time in Paris, is that right?

A. I probably told her. I don't remember.

Q. Before she left, is that right?

A. Yes.

Q. Now, while you were talking to Mrs. Treitler before she went to Paris, did she tell you about having any relatives in Paris?

A. She said she had a family in Europe.

Q. What did she tell you about the family?

A. She told me she had lost a sister during the war.

Q. Is that all she told you?

A. That is all.

Q. She didn't tell you about having any brothers in Europe?

A. She may have mentioned brothers or cousins.

Q. You do not now recall, is that right?

A. I don't recall any specific conversation regarding her family.

Q. Did she suggest to you that you come to Paris to meet some of her brothers, or one of her brothers?

A. No.

By Mr. Then: Objected to as a suggestion. State what the conversation was.

812 By the Court: He is cross examining.

By Mr. Downing: It is cross examination.

By the Court: Overruled.

By Mr. Gerber: On behalf of Munio Knoll, I object to this:

By the Court: Overruled.

By Mr. Gerber: Conclusions are no more admissible on cross examination than on direct, your Honor.

By the Court: That is true, but the objection is overruled.

By Mr. Downing: Read the question.

(Question read.)

By Mr. Downing:

Q. Mrs. Treitler knew that you were in the Army Corps, is that right?

A. She may have heard, because the women in that organization were very proud of it.

Q. As a matter of fact, you knew her before you went into the army, is that right?

A. Yes.

Q. Then you were gone how long in the army?

A. Two years.

Q. So that you were gone from this organization 813 that you and Mrs. Treitler belonged to, is that right?

A. Yes, while I was in the Service.

Q. Then you resumed your activities in this organization after you returned from the Military Service?

A. Yes, sir.

Q. Now, while you were talking to Mrs. Treitler about this matter, did Mrs. Treitler suggest to you that you bring your honorable discharge certificate from the United States Army?

A. No, sir, she did not.

Q. As a matter of fact, you took your honorable discharge certificate along with you, is that right?

A. Yes, I did.

Q. For what purpose did you take that along?

A. We were told time and time and again in the army to always carry our army discharge travelling in a foreign country or even in the United States.

Q. You had not obtained your army discharge until after you left the army?

A. Certainly.

Q. And they were telling you while you were in the army to take it with you when you did not have it?

A. No, the clerks in our organization were always telling us to take our discharge papers with us because 814 it was an excellent identification.

Q. Even though at that time you did not have it?

A. Yes, sir.

Q. That is the only reason you took your army discharge certificate along?

A. Yes, sir.

Q. You had your passport?

A. Yes, I had my passport.

Q. Did it have your picture in it?

A. Yes.

Q. It had your name and address in it?

A. Yes.

Q. So you needed additional identification, is that right?

A. Yes.

Q. Now, as a matter of fact, Miss Klemtner, isn't it true that Mrs. Treitler had you take your army honorable discharge certificate?

A. No, it is not true.

Q. You want this court and jury to believe Mrs. Treitler never discussed with you your honorable discharge certificate?

By Mr. Sokol: If the Court please, I do not think he should badger the witness. He has asked the same 815 question three times, and she has answered.

By the Court: No. I guess she has answered that.

By Mr. Downing:

Q. Did Mrs. Treitler ever pay you any money between the years 1947 through 1949?

A. She did not.

816 Q. Did she ever give you any gifts of any type?

A. I have a handkerchief from her.

Q. That is the only gift you ever received?

A. That is right.

Q. How many times did you see Regina Treitler after you were in Paris?

A. I don't know, sir. We met sometimes for lunch or shopping, but I cannot tell you how many times.

Q. You saw her quite frequently while both you and Mrs. Treitler were in Paris, is that right?

A. Not too frequently, no.

Q. When did you first meet Marcel Lutwak?

A. I think in 1946.

Q. In 1946?

A. Yes, sir.

Q. You are sure it was not in 1947?

A. No, I think it was 1946.

Q. Was it the last part of the year?

A. Probably.

Q. Where did you meet him?

A. He came to pick his aunt up one day at a meeting, and I was introduced to him.

Q. Then when did you next see Marcel Lutwak 817 after that?

A. Oh, several months passed and I bumped into him downtown one day.

Q. When was that?

A. I don't know, Mr. Downing.

Q. Well, will you say it was in 1947?

A. It may have been the early part of the year.

Q. Did you know that Marcel Lutwak went to Paris?

A. No, I did not.

Q. When did you first hear about the fact that he went to Paris?

A. The Immigration authorities in California told me that.

Q. That was the first time you ever heard it?

A. Yes.

Q. Did Marcel Lutwak have anything to do with you going to Paris?

A. No, he did not.

Q. He had nothing to do with the preparation or plans of going?

A. No, sir.

Q. You never discussed with him the fact that you were going to Paris, is that right?

A. Yes, I told him that. I was going.

818 Q. When did you talk to Marcel about the fact that you were going?

A. After I had decided to go.

Q. Well, that was approximately how long before November 1, 1947?

A. A few weeks, perhaps.

Q. Tell us what you told Marcel and what Marcel told you about anything at that time and place.

A. I told Marcel that I was going. As I recall, he told me it was a nice city. I am not certain, but I think he said he once lived there, and told me it would be cold but not as cold as Chicago weather, and damp at that time of the year.

Q. Anything else you can recall?

A. Nothing pertinent, Mr. Downing.

Q. Did he ever tell you at that time that he had been to Paris recently?

A. No.

Q. Did he ever tell you that he had gone to Paris and had married and had returned?

A. No, sir.

Q. This was some time, you say, in the month of October before you left, 1947?

A. It was September or October.

819 Q. How did you happen to meet Marcel Lutwak at that time?

A. We met at a Pioneer meeting.

Q. That is this same organization that Regina Trietler belonged to?

A. Yes, sir.

Q. Was Regina Treitler present then, too?

A. I don't really know.

Q. You don't recall, is that right?

A. I recall that our group had met, the younger group, and Marcel was there.

Q. Now, is that the only conversation that you had with Marcel about this matter prior to the time you left?

A. Yes, it is.

Q. Then, thereafter, you never saw Marcel at any time before you left?

A. Marcel took me to the airport with Jane.

Q. Marcel took you to the airport?

A. Yes, he did.

Q. Is that the only thing he did in connection with your trip going to Paris?

A. He spoke to somebody at the airport and told them to take care of my luggage, nothing more.

820 Q. Other than those events, do you recall anything else he did in connection with your trip to Paris?

A. Nothing.

Q. That is all he had to do, either in making arrangements or plans for your going to Paris, is that right?

A. Yes, sir.

Q. I now show you Government's Exhibit 6, marked for identification, and ask you to look at that and ask you if you have seen the original of that before?

A. Yes, I have.

Q. I ask you if that is the original of the passport application that you made out—

By Mr. Eben: May I see it, please?

By Mr. Downing:

Q. —at the time you made the application for the passport to leave the United States?

A. I assume that it is.

Q. Well, is there any question in your mind as to whether the handwriting you see thereon is yours?

A. No.

Q. You know it is your handwriting, don't you?

A. Yes, it is.

Q. And the signatures on page 2 of the document 821 which you looked at are your signatures, is that right?

A. Yes, sir.

By Mr. Gerber: Your Honor, it is about time to recess. We might expedite matters by recessing now.

By the Court: No. What is this paper?

By Mr. Downing: I want to ask a couple more questions before we recess, please.

By the Court: Yes. Now, gentlemen, if you and the other counsel want to look at that paper, look over Mr. Bartoline's shoulders, so that we won't take up so much time.

By Mr. Downing:

Q. As a matter of fact, your signature here is actually your signature, is that right?

By Mr. Eben: Just a moment. There have some matters come up in connection with this I would like to discuss out of the presence of the jury, your Honor.

By the Court: Step into the jury room, ladies and gentlemen.

(The following proceedings were had out of the presence and hearing of the jury:)

822 By Mr. Downing: Your Honor, may we also have this discussion out of the presence of the witness?

By the Court: Step into my Chambers, madam. (Witness leaves court room.)

By Mr. Eben: It strikes me, your Honor, that first, this document is immaterial because he has already established she had a passport to go to Europe. He is now apparently, and by he I mean the Assistant District At-

torney, trying to lay the basis for some accusation against this witness, that she made fraudulent statements at the time she made her application for a passport. Now, there are any number of reasons why he ought not to be permitted to do that.

By the Court: Let me see it. Go ahead, what is your point?

By Mr. Eben: I say, first, he is going to ask her to admit that this is an application that she filled out. He will then attempt to show the statements contained therein are untrue, I point out to your Honor, when you do such a thing it is a violation of the law of the United States.

By the Court: I do not think there is anything in 823 the record to indicate that is what he is going to do.

By Mr. Eben: Yes. It states "Research", if your Honor will look. It states she went for the purpose of research. She ought to be permitted to know that she should not make statements that may incriminate her. I think you should tell this witness, in complete protection of her constitutional rights, that she should not answer any questions that may incriminate her.

By the Court: You do not need to worry about this witness' constitutional rights. I will take care of her 824 constitutional rights better than you ever have.

Bring in the jury.

(The following proceedings were had in the presence and hearing of the jury.)

By Mr. Eben: I would like the record to show the witness is not represented by counsel either.

By the Court: Well, she had counsel in this case.

By Mr. Eben: I beg your pardon?

By the Court: She had counsel in this case.

By Mr. Eben: Now, I ask for a mistrial.

By the Court: Overruled.

By Mr. Downing: Mr. Reporter, will you read the last question, please?

(Last question read.)

By Mr. Downing:

Q. By that, you refer to the place on the line, "Signature of Applicant"?

A. Yes.

Q. As a matter of fact, at the time you made that application, Marcel Lutwak accompanied you, didn't 825 he?

A. Yes, he did.

Q. So he was in on that part of the arrangement?

A. Yes, he helped me with it.

Q. So your other answer has to be changed in accordance with the additional facts I have shown?

A. You never asked me that question before.

Q. Did Marcel have anything else to do with arranging your trip to Paris?

A. No.

Q. At the time you went to Paris, you were going to do research work, according to this application, is that right?

A. Research in the sense that I like to write, and I was interested in travelling.

Q. Well, that is the purpose of the trip you put down here on the application, isn't that right?

A. I am sorry. I put down research and travel.

Q. Do you see the word "travel" there?

A. No.

Q. Just the word "research"?

A. That is right.

Q. Tell the court and jury what type of research you were going to do.

826 By Mr. Eben: Objected to. That is my point.

By the Court: Overruled.

By Mr. Eben: I think your Honor ought to tell the jury what her constitutional privileges are.

By the Court: Overruled.

By the Witness:

A. I had been a copywriter, and I had been writing for many years, and this was my best subject in school, newspaper work and library were the things that interested me, and I had been interested in travel. That is one reason I joined the army. I wanted to see other parts of the country and learn people.

By Mr. Downing:

Q. Did you actually do any research work in Paris?

A. Yes, I did.

Q. Actually you had not done any writing while you were working for Sears Roebuck, had you?

A. I was employed as a writer. That is how I made my living.

Q. You were employed as a writer at Sears Roebuck?

A. Yes, sir.

827 Q. And you were getting what, fifty dollars a week?

A. Fifty-two fifty, I believe.

Q. Were you seeing Marcel frequently at the time that this application was made out?

A. Mr. Downing, what do you mean by frequently?

Q. Well, you know the word. You are a writer. You know what the word "frequently" means.

A. Every few weeks, perhaps three or four times every three or four weeks, once or twice a month.

Q. Did you ask Marcel, or did he tell you he would go down and have you make out this application for a passport?

A. I believe Marcel volunteered.

Q. Actually you had only known Marcel about a year at that time, is that right?

A. Yes.

Q. This document says he knew you four years. That would carry it back to 1943. Then your statement there is not correct, or this statement is not correct, is that right?

A. I don't know who said that.

By Mr. Eben: The purpose of the examination is much more evident than it was before.

828 By the Court: Overruled.

By Mr. Eben: I have not stated my objection. May I be permitted to do so?

By the Court: ~~Very~~ briefly.

By Mr. Eben: I say your Honor should advise the witness of her constitutional rights.

By the Court: Overruled.

By Mr. Eben: I would like the record to note that.

By Mr. Downing:

Q. You were present when Marcel signed that document, is that right?

A. Yes, sir.

Q. Both you and Marcel were together?

A. Yes.

Q. You saw Marcel sign it, is that right?

A. He was standing next to me.

Q. There was just you and Marcel and the clerk at the time making the passport application, is that right?

A. Yes.

Q. Did Marcel write in the four years or did you write in the four years, or did the clerk write in the 829 four years?

A. I don't know.

Q. You do not now recall?

A. No.

By Mr. Downing: If your Honor please, that is all I have about this document at this time. It is a good breaking-off point.

By the Court: We will recess at this time, Ladies and Gentlemen, until two o'clock.

(Thereupon the jury was excused until two o'clock p.m. of the same day, January 12, 1951, after which the following proceedings were had out of the presence and hearing of the jury:)

By the Court: Young lady, just wait a minute.

By the Witness: Yes, sir.

By the Court: Don't discuss this case with anyone during this recess we are about to take, and return here at two o'clock. Do not discuss the case with anyone. Do not discuss your proposed testimony or the testimony 830 you have given with anyone.

Return here at two o'clock.

By the Witness: Yes, sir.

(Thereupon a recess was taken to 2:00 o'clock p.m. of the same day, January 12, 1951.)

831

• • (Caption—No. 50 CR 464) • •

Chicago, Illinois
January 2, 1951
2:00 o'clock p. m.

Met pursuant to recess.

Present:

Mr. Downing
Mr. Owen
Mr. Gerber
Mr. Bartoline
Mr. Sokol
Mr. Eben
Mr. Watt
Weissbourd

And Thereupon the following proceedings were had herein:

By the Clerk: Case on trial.

By the Court: Proceed.

MRS. LEOPOLD KNOLL, a witness called by the Court, having been previously sworn, testified as follows:

Cross Examination (Cont'd) by Mr. Downing.

832 Q. What is your name, please?

A. Mrs. Leopold Knoll.

Q. You are the same witness who testified this morning and was sworn, is that right?

A. Yes, I am.

Q. Now, you went to Paris November 1st, 1947?

A. Mr. Downing, I would like to ask a question, if I may.

By Mr. Downing: You may direct your question to the Court.

By the Witness: Judge Barnes, may I ask a question, please?

By the Court: Yes.

By the Witness: I would like permission of the Court to see counsel.

By the Court: Whom have you talked with since you left here at 12 o'clock?

By the Witness: My mother.

By the Court: Only?

By the Witness: Yes, sir.

By the Court: Whom had she talked with?

By the Witness: No one.

By the Court: Did she talk with counsel?

By the Witness: No, sir, she did not.

833 By Mr. Downing: Your Honor, there was a little conversation between—

By Mr. Eben: This should be out of the presence of the jury, I submit..

By the Court: Step into the jury room, ladies and gentlemen.

(The following proceedings were had out of the presence and hearing of the jury:)

By the Court: Where is your counsel, madam?

By the Witness: I have none, sir. I probably will be able to get one by tomorrow morning.

By the Court: Have you had counsel in this case?

By the Witness: Mr. Eben has been my counsel.

By the Court: Well, step out and advise with Mr. Eben.

By Mr. Eben: May it please the Court, I was retained in the case by Mrs. Knoll's husband to represent him as a defendant, and I was representing myself as representing Mr. Knoll, not Mrs. Knoll. I think that she should have independent counsel. I suggested that before.

By the Court: Whom do you want to get, madam?

By the Witness: I don't know, sir.

834 By the Court: Now, I will advise you. How do you think she should be advised, counsel for Mr. Leopold Knoll? Now, advise the Court how this Court should advise the witness.

By Mr. Eben: I think she ought to be advised that she has a constitutional privilege not to give any incriminating testimony against herself. I think your Honor should say that she does have that privilege, that she may not ask for that privilege generally, but only in connection with questions which she thinks will incriminate her, or the answer will incriminate her, she ought to be permitted to advise with her counsel to determine whether or not she should answer.

By the Court: Do you understand what counsel said?

By the Witness: Yes, sir. I was told to get the advice of counsel.

By the Court: I am advising you as Mr. Eben has stated. I, the Court, will advise you that you have the right to refrain from incriminating yourself. If you think

any answer given to any question put to you will in-

835 criminate you, you have the right to refuse to answer,

on the ground it will incriminate you. If you are in doubt about it, you advise the Court that you want the advice of your counsel, and the Court will give you that opportunity. Do you understand what I say to you?

By the Witness: Yes, sir, I do.

By the Court: Bring in the jury.

By Mr. Eben: She has no counsel, that is the point.

By the Court: No, I will give her the right when the time comes.

By Mr. Eben: Let me ask you a question. Did you communicate with this woman's mother?

By Mr. Eben: No.

By the Court: At noontime?

By Mr. Eben: No, sir.

By the Court: Any of your associates?

By Mr. Eben: I should say no. They were with me all during the noon hour.

By the Court: They did not communicate with her?

By Mr. Eben: They did not.

By the Court: Bring in the jury.

836 (The following proceedings were had in the presence and hearing of the jury:)

By Mr. Downing:

Q. Now, you went to Paris November 1st, 1947, is that right, madam?

A. Yes, sir.

Q. And you went by TWA airplane, is that right?

A. That is right.

Q. Did you pay a thousand dollars for your round trip ticket, is that right?

A. No, not that much.

Q. How much did you pay?

A. Between six and seven hundred dollars for the ticket.

Q. As a matter of fact, didn't you tell me once before you paid a thousand dollars?

A. No, I never told you that.

Q. You paid between six and seven hundred dollars?

A. Yes.

Q. Where did the money come from you used to purchase the ticket?

A. I refuse to answer the question.

By the Court: On what ground, madam?

By the Witness: On the ground that it may incriminate me.

By the Court: You need not answer.

By Mr. Downing:

Q. Did you withdraw the money from your bank account to the Sears Community Bank?

A. Yes, I did.

Q. Did you withdraw the entire amount from the Sears Community Bank?

A. I withdrew \$1,000.

Q. Did you withdraw that just immediately prior to the time you left?

A. No, just about six or seven weeks before I left.

Q. Approximately how long?

A. About six or seven weeks before I left.

Q. What was the exact amount you withdrew at that time?

A. \$1,000.

Q. Was the name of the account Grace Klemtner and Zelba Klemtner?

A. That is right.

Q. You withdrew at that time \$1,000?

A. Yes, sir, I did.

Q. Thereafter, did you withdraw any money from the account?

838 A. No, I did not.

Q. Is Zelba Klemtner your mother?

A. Yes, she is.

Q. As a matter of fact, that bank account does not show any withdrawal of a thousand dollars, isn't that right?

A. No, it is not right.

By Mr. Eben: Objected to. The statement will speak for itself, if they had it, it is the best evidence.

By the Court: Sustained.

By Mr. Downing: Will you mark these Government's Exhibits 26 and 27 for identification, please.

(Said documents were marked Government's Exhibits 26 and 27.)

839 By Mr. Downing:

Q. I now show you a document which is identified as Government's Exhibit 27, marked for identification, and ask you to look at that and ask you if you have ever seen the original of that before.

A. This looks like the application for an account.

Q. I ask you to look at that and ask you if you find your handwriting on there.

A. Yes, that is my handwriting.

Q. By that, you refer to the name Grace Klemtner?

A. Yes, I do.

Q. Address, 2501 North Avers?

A. That is right.

Q. Occupation, copywriter?

A. That is right.

Q. Birthplace, Chicago. Is that right?

A. Yes, it is.

Q. I ask you if this document was used by you at the time you opened the account at the Sears Community Bank in Chicago?

A. It may be, yes.

Q. Well, is it or isn't it?

A. What is the date on that?

Q. That is April 7, 1947.

840 A. That would be approximately the time I opened the account.

By the Court: I cannot hear what the witness said.

By the Witness: Yes, sir, it is mine.

By Mr. Downing:

Q. There is no question that this represents the signature card of the Sears Community Bank?

A. That is right.

Q. I ask you to look at Government's Exhibit 26, marked for identification, and ask you if you have seen the original of that before.

A. This looks like a copy of the bank book.

Q. I ask you to look at the writing at the top, the name. That is your writing, Grace Klemtner, is that right?

A. Yes.

Q. Now, I ask you to look at that document, and ask you if you find any withdrawals on there in the exact amount of \$1,000 approximately six weeks before November 1, 1947.

By Mr. Eben: I object to that. The document will speak for itself, I assume, assuming it is a genuine document.

841 By the Court: She may state.

By Mr. Eben: I point out to the court that this is a photostat she is examining.

By the Court: I understand.

By Mr. Eben: There may have been alterations, and so on.

By Mr. Downing: Will you read the last question?
(Question read.)

By the Witness:

A. That statement is wrong.

By Mr. Eben: Just a minute, please. May I point out to the court in connection with a prior witness, Mrs. Munio Knoll, Mrs. Knoll was asked to point out something in her petition for divorce, and your Honor ruled that the document would speak for itself. That is on cross examination.

By the Court: It does sometimes.

By Mr. Eben: I submit the circumstances are the same here.

By the Court: Overruled.

By Mr. Downing:

Q. You say this bank statement is wrong, is that 842 right?

A. I believe so, yes.

Q. Now, you participated in a marriage ceremony in Paris, France, on November 6, 1947?

A. Yes.

Q. With whom?

A. With my husband Leopold.

Q. That is the defendant Leopold Knoll in the court room?

A. Yes.

Q. Whereabouts in Paris was this marriage ceremony performed?

A. Something comparable to the city Hall here in Chicago.

Q. Do you recall by whom it was performed?

A. By a woman.

Q. Who was present at the time the ceremony was performed?

A. Bess Knoll and one of Poldi's cousins.

Q. By Bess Knoll, you mean Bess Osborne, the person you saw come out of the court room this morning?

A. Yes, sir.

Q. When you first met Bess, was she introduced to you as Bess Osborne?

843 A. I don't remember, sir.

Q. You saw Bess quite a few times there in Paris?

A. I met Bess one day when I was sick, and she came in and asked me if she could help me or give me anything.

Q. How long was that prior to the time you went through this marriage ceremony with Leopold Knoll?

A. It was before. I married Leopold.

Q. Now, at the time you went through the ceremony, did you receive a wedding ring from Leopold Knoll?

A. The French law does not require it.

By Mr. Downing: Will you read the question?

(Question read.)

By the Witness:

A. No, I did not.

By Mr. Downing:

Q. Have you to this date received a wedding ring from Leopold Knoll?

By Mr. Eben: Objection, immaterial.

By the Court: Overruled.

By the Witness:

A. No.

By Mr. Downing:

Q. What was the date you first met Leopold Knoll?

844 A. He was with his sister when I arrived in Paris.

By Mr. Downing: I ask that the answer be stricken as not responsive.

By the Court: Strike it out.

By Mr. Downing: Read the question, Mr. Reporter, please.

(Question read.)

By Mr. Witness:

A. Mr. Downing, I don't remember whether I got to Paris November 1st or 2nd. What date was it?

By Mr. Downing:

Q. If the records show you left here on November 1st, approximately how many hours did it take you to get to Paris?

A. A day and a night. It was on the 2d.

Q. It was on November 2d or November 3d, is that right?

A. Yes, sir.

Q. Compensating for the time difference between Chicago and Paris.

A. If I am correct, I think the date there would have been different from here.

Q. Be that as it may, it took you a day and a night, is that right, ma'am?

845 A. Yes.

Q. You met Leopold at the air port, is that right?

A. Yes, I did.

Q. So that there was a difference between November 2d, let us say, and November 6th, between the date you first met him and the date you were married?

A. Yes, sir.

Q. Had you ever heard of Leopold prior to the time you went to Paris?

A. No, sir, I did not.

Q. So that that was the first date you had ever met him?

A. Yes, sir.

Q. You had never talked to Marcel Lutwak the defendant, or the defendant Regina Treitler, about Leopold Knoll prior to the time you left Chicago?

A. I refuse to answer the question.

By Mr. Downing: The witness has refused to answer the question.

By the Court: You refuse to answer?

By the Witness: Yes, sir.

By the Court: On the ground it may incriminate you?

By the Witness: Yes, sir.

846 By the Court: Put another question.

By Mr. Downing:

Q. As a matter of fact, this \$1,000 you referred to previously was paid to you on or about October 30, 1947, by Marcel Lutwak, isn't that right?

A. No, sir, that is not so.

Q. You had never received any money from Marcel Lutwak on or about November 1, 1947?

A. I never received any money from Marcel.

847 Q. At no time?

A. At no time.

Q. You have never at any time received \$50 for incidental expenses?

A. Yes, a loan of money at New York.

Q. That was after you returned from Paris?

A. Yes, sir.

Q. So the first answer should be changed to add \$50?

A. I received \$50 from Marcel as a loan and it was repaid.

Q. That was after you came back, after you had gone through this marriage ceremony?

A. Yes, sir.

Q. Now, after you arrived in Paris, you stayed at the le Khedive Hotel, is that right?

A. Yes, sir, that is correct.

Q. I believe you previously testified that Regina Treitler made arrangements to get that room for you?

A. Yes, sir.

Q. However, you had accommodations through some travel bureau at some other hotel?

A. At the Hotel Paris.

Q. Why was it that you did not stay at the hotel where you had the reservation?

848 A. Because I was not certain I would meet Mrs. Treitler. When I met her, she told me she had accommodations at her hotel, and I went with her.

Q. As a matter of fact, you had already submitted a document to the Department of State at the time you applied for your passport, indicating that you had a reservation in Paris, isn't that right, ma'am?

A. I don't recall.

Q. I now show you Government's Exhibit 6, marked for identification, which I have previously shown to you this morning, to the sheet attached thereto, entitled "Central National Bank", and ask you to look at that and ask you if that refreshes your memory?

A. Yes, it does.

Q. If you will look at the next sheet attached to it, does that refresh your memory?

A. No, it does not.

Q. The speed letter addressed to you, you have never seen that before?

A. No, I have not.

Q. Will you read it, please, not out loud, but just to yourself?

A. I absolutely do not recall seeing this letter.

849 Q. Now, will you look at the letter from the Central National Bank, to see if there is any relationship between those two?

A. I do not understand your question, Mr. Downing.

Q. By looking at this page entitled "Central National Bank", which is a part of Government's Exhibit 6, marked for identification, and reading the contents of that page, are you able to determine now whether or not you have seen that sheet entitled "Passport Division, Speed Letter", which is also attached, and which you said you did not recall having seen before?

A. That is the letter addressed to me?

Q. That is a Passport Division speed letter.

A. This letter indicates it was mailed to my home.

Q. Yes?

A. I have no recollection of ever seeing it.

Q. How do you account for the letter in the file from the Central National Bank concerning reservations? That is the one I previously showed you.

A. I am sorry, I do not understand your question.

Q. Did you take this and give it to the proper authorities, the original of this letter entitled "Central National Bank"?

A. No, I did not.

Q. "It was sent in from the Central National Bank, 850 is that right, to the person addressed on the letter?"

A. It was never sent to me. I have never seen it.

Q. Did you have reservations at the Hotel Paris?

A. I made that statement a few minutes ago.

Q. This speed letter, which is a part of this, you have never seen before?

A. No, I have not.

Q. How long did you stay at the le Khedive Hotel in Paris?

A. Oh, about three weeks.

Q. Actually, you stayed there until about the 9th or 10th of November, didn't you?

Q. Now, Bess Osborne stayed there at the Royal Monceau Hotel when you moved to the Royal Monceau Hotel, is that right?

A. Yes, she did.

Q. Do you know that Bess left Paris about the 12th of November?

A. I do not recall the date.

Q. Well, you went to England from Paris on the 13th of November, didn't you?

A. Yes, I did.

Q. You knew that Bess and Munio or Sygmunt had 851 gone from Paris at the time you went to England?

A. I don't recall.

Q. Well, how many days did you stay at the Royal Monceau Hotel while Bess was there?

A. I was there about two weeks.

Q. At the Hotel Monceau?

A. Yes.

Q. Does that include the time while you were in England, or is that exclusive of the time that you were in England?

A. No, I retained my room.

Q. How were you registered at the Hotel Monceau?

A. As my passport said, Grace Klemtner.

Q. How were you registered at the le Khedive Hotel?

A. As Grace Klemtner.

Q. Did you change it again?

A. I assumed my husband took care of those things.

Q. You did not change it personally?

A. No, sir.

Q. Did Leopold Knoll also live at the le Khedive Hotel?

A. He stayed with me.

Q. Did he register at the le Khedive?

A. No, he did not.

852 Q. By staying there, you mean he came and visited you?

A. I mean he came and he lived with me.

Q. Did Bess Osborne have a room right next to you at the Royal Monceau Hotel?

A. Yes, she did.

Q. They were adjoining rooms, is that right?

A. Yes, sir.

Q. So, on the 13th of November, about a week after your marriage, you went to England from Paris, is that right?

A. It seems to me it was more than a week.

Q. Well, if your passport says it was on the 13th that you went to England, you won't argue with the date therein, will you?

A. No.

Q. How long did you stay in England?

A. Just a few days.

Q. Well, a week or ten days or two weeks?

A. No, two or three days.

Q. Was Leopold Knoll with you in England?

A. No, he was not.

Q. What kind of work were you doing in England, research work?

853 A. That was the time Elizabeth got married. Queen Elizabeth, and I went to watch the festivities.

Q. You went over to see Queen Elizabeth get married?

A. No, I would not state it as such, I went over to visit England.

Q. After you came back to Paris, you again resumed living at the Royal Monceau, is that right?

A. I did.

Q. Why did you change hotels from the le Khedive, that was where Leopold Knoll was living, wasn't it?

A. Because something happened between my husband and myself.

Q. So you moved and went to the Royal Monceau?

A. Yes, sir, I did.

Q. Leopold actually was living at the le Khedive; is that right?

A. Yes, sir, he was.

Q. Now, when did you leave Paris, that is, to return to the United States?

854 A. On December 4th or 5th, I don't recall the date.

Q. Of 1947?

A. Yes.

Q. With whom did you come to the United States?

A. I returned with my husband.

Q. That is the defendant Leopold Knoll, is that right?

A. Yes, sir.

Q. How did you come?

A. We flew.

Q. Who paid, if you know, the fare for Leopold?

A. I don't know who paid Leopold's fare.

Q. Did Leopold pay your fare back to the United States?

A. I had a round trip ticket when I left.

Q. Where did you land in the United States?

A. LaGuardia Air Port in New York.

Q. And at that time, were you with Leopold when he applied for admission into the United States?

A. I was.

Q. Were you present when he appeared before the Immigration Inspector there and filled out certain forms?

855 A. We were together.

Q. I beg your pardon?

A. We were together.

Q. I now show you Government's Exhibit 3 in evidence, and ask you to look at this, and ask you if you have seen that before?

A. I do not believe I have seen this.

Q. You do not believe you have seen this before; directing your attention to the signature of Leopold Knoll, do you recall having seen that before on that document?

A. I would like to ask you a question.

By Mr. Downing: Direct any questions to the court.

By the Witness: May I ask a question, sir?

By the Court: Yes.

By the Witness: I want to know if this is the paper that Leopold filled out when we arrived in New York.

By Mr. Downing: That, according to the evidence was filled out in New York, that is right, at the port of entry.

By the Witness:

A. Well, I was with him when he filled it out.

856 By Mr. Downing:

Q. So that you were present when he did fill this out?

A. Yes.

Q. And you were questioned along with Leopold by the Government Inspector, is that right?

A. Yes, I was.

Q. Did you see the document then at that time?

A. No, sir.

Q. Did you ever reside in Chicago at 35 South Central Park, Chicago, Illinois?

A. No, I did not.

Q. Have you ever lived as man and wife with Leopold Knoll at 35 South Central Park Avenue, Chicago, Illinois?

A. No, not at that address.

Q. With reference to this information concerning the serial number in the armed forces of the United States—

A. That is my serial number.

Q. That is your serial number?

A. Yes.

857 Q. Now I direct your attention to Government's Exhibit 12 and ask you to look at the sheet attached thereto, entitled, "Passenger Card," and ask you to look at that and ask you if you have seen the original of that before.

A. Yes, I have.

Q. When did you see the original of that document before?

A. I believe this is the document that was filled out in New York.

Q. At the same time that you came in with Leopold to the United States?

A. I think so.

Q. Now directing your attention to Question No. 8 on this document, which reads:

"Name and address of friend or relative to whom destined in that country.

"Grace Knoll, 35 South Central Park, Chicago, Illinois."

Are you Grace Knoll?

A. Yes, I am.

Q. Did you ever live at 35 South Central Park, Chicago, Illinois?

A. No. I have not.

858 Q. And you have never lived up to this time at that address, have you?

A. No.

Q. Since returning to the United States on or about December 5, 1947, and up to April 1, 1950, did you ever live with Leopold Knoll as man and wife in the United States?

A. No, I did not.

Q. Between the date of December 5, 1947 and April 1, 1950, did you ever have any sexual relations with Leopold Knoll in the United States?

A. Your Honor, I have to ask a question on dates again.

By the Court: You have to what?

By the Witness: I have to ask a question concerning dates. I don't remember the dates.

By the Court: She says she doesn't remember dates. By Mr. Downing:

Q. Go ahead, ask your question.

A. I would like to know what date it was that I returned to Chicago for the first federal grand jury.

859 Q. That was April 5th.

A. April 5th. That is when I was with my husband.

Q. I am speaking of April 1, 1950. That is, between December 5, 1947, and April 1, 1950—I should say December

5, 1947, and April 1, 1950, did you ever have, in the United States, any sexual relations with Leopold Knoll?

A. Yes, I did.

Q. When was the first date?

A. I don't remember.

Q. Was it immediately upon your return from Paris?

A. No, it was when I returned to Chicago from Los Angeles.

Q. And by that you are referring to on or about April 1, 1950?

A. Yes.

Q. After you had received a subpoena to appear before the Federal grand jury in connection with this matter.

A. Yes, it is.

Q. But up between those dates had you ever had any sexual relations?

A. No.

Q. After you landed in the United States Jane 860 Turner met you there at the air port, didn't she?

A. Yes.

Q. And Marcel Lutwak, the defendant, and Munio Knoll, the defendant, were also present?

A. Yes.

Q. You went to live in the Governor Clinton Hotel, is that right?

A. I believe that was the hotel.

Q. Is there any question in your mind?

A. I don't remember the name.

Q. But you went to live at a hotel with Jane Turner, is that correct?

A. Yes, I did.

Q. Leopold Knoll didn't live there, did he?

A. No, he did not.

Q. And you and Jane stayed there for about two or three days?

A. That is correct.

Q. And then you and Jane came to Chicago by train?

A. Yes, I did.

Q. And did Leopold Knoll accompany you?

A. No, he did not.

Q. And you and Jane resided at some friend's house here in Chicago for a day or two, is that right?

861 A. That is correct.

Q. Leopold Knoll didn't live there, did he?

A. No, he did not.

Q. Did you see him at that time in Chicago?

A. No, I did not.

Q. You knew that he was in Chicago?

A. Yes, I did.

Q. Then you and Jane left Chicago in the middle of December, 1947, and proceeded to Los Angeles?

A. That is correct.

Q. When you came to Chicago at that time did you see your mother?

A. No, sir, I did not.

Q. You did not call your mother and tell her you had been married?

By Mr. Eben: I object. I object to that. What has that got to do with this particular thing? It is conversation outside the presence of any defendant here.

By the Court: Objection overruled.

By Mr. Gerber: Objection as to Munio Knoll.

By the Court: Overruled.

862 By Mr. Downing:

Q. Did you not call your mother and inform her you were in Chicago at that time, did you?

A. No, I didn't.

Q. And you didn't call her and let her know you had ever been married up to that time, had you?

A. No.

By Mr. Eben: Same objection.

By the Court: Overruled.

By Mr. Downing:

Q. When you went to Paris you told your mother you were going to get a job for a governmental agency, isn't that right?

What is your answer?

A. I didn't answer.

By Mr. Eben: Same objection.

By Mr. Gerber: Objection.

By Mr. Sokol: Objection.

By the Witness: What was the question?

(Question read.)

By the Witness:

A. That is correct.

By Mr. Downing:

Q. After you and Jane reached Los Angeles, what
863 did you then commence doing?

A. To look for employment.

Q. And you thereafter became employed, did you?

A. Not immediately, no.

Q. Well, some time thereafter you did, is that right?

A. That is correct.

Q. You and Jane resided at a couple of addresses out there between the date you went there and the present date, is that right?

A. That is correct.

Q. When you first went there you rented the apartment or the rooms that you were renting under the name of Grace Klemtner, isn't that right?

A. Yes.

Q. When you received letters from your mother you received them under the name of Grace Klemtner?

A. Yes, I did.

By Mr. Eben: Objected to.

By the Court: Overruled.

By Mr. Downing:

Q. Then you returned to Chicago in October of 1948?

A. That is right.

Q. And your sister got married at that time?

864 What is the answer?

A. Yes.

Q. The reporter can't get the nod of your head.

A. I am sorry.

Q. You stayed at your home at that time?

A. Yes, I did.

Q. Did you tell your mother or sister at that time that you had gone through a marriage ceremony in Paris?

A. No, and for a good reason.

By Mr. Downing: I move to strike out the last part of the answer, as not responsive.

By the Court: "for a good reason" may go out.

By Mr. Downing:

Q. And this time, while you were in Chicago; how long were you here?

A. About two weeks.

Q. And you had no relations as man and wife with Leopold Knoll during that period of time?

A. No.

Q. What is your answer?

A. No.

Q. And then you went back to Los Angeles again?

865 A. That is correct.

Q. And you have been going to school there ever since?

A. Yes.

Q. What kind of schooling are you taking?

A. I am working for my bachelor's degree.

Q. And at 1161½ South Bonnie Brae in Los Angeles you are known as Grace Klemtner, when you rented that apartment, is that right?

A. That is correct.

Q. In fact, you are supposed to be back taking examinations next week, as you told me the other day, is that right?

A. This is the end of the semester.

Q. Did Leopold Knoll ever come out to Los Angeles prior to April 1, 1950?

A. No, he did not.

Q. As a matter of fact the only purpose of your marriage to Leopold was solely to bring Leopold Knoll to the United States, isn't that right?

A. No, it is not.

Q. As a matter of fact, you did not tell your mother that you ever went through a marriage ceremony until April 5, 1950, is that right?

866 By Mr. Gerber: I object.

By Mr. Eben: I object, repetitious.

By the Court: Overruled.

By Mr. Downing: Will you read the last question?
(Question read.)

By the Witness:

A. That is correct.

By Mr. Downing:

Q. When did you tell your sister—

By Mr. Eben: I object to that.

By the Court: Overruled.

By the Witness:

A. I don't recall the date, but it was much before that.

By Mr. Downing:

Q. That was after the immigration authorities had talked to your sister and told your sister that you had gone through a—

A. Yes.

Q. —marriage ceremony, is that right?

A. Yes.

By Mr. Downing: May I have just a moment, your Honor?

867 By Mr. Downing:

Q. While you were in Paris you didn't pay your hotel bill at the le Khedive and the Royal Monceau?

A. Poldi and I shared our expenses.

Q. Did you pay your hotel bill while you were in Paris?

A. Judge Barnes, I can't answer the question any other way.

By Mr. Downing: If your Honor please, I submit the question is answerable by yes or no.

By the Court: The question is answerable yes or no.

By Mr. Downing: Will you read the question again, Mr. Reporter, please?

By the Court: Did you pay your hotel bill?

By the Witness: We both paid my expenses—

By the Court: Who?

By the Witness: My husband and myself, we shared our money.

By the Court: Did you pay your—

By the Witness: I may have given it to the concierge.

By the Court: To the who?

868 By the Witness: The management of the hotel.

By Mr. Downing:

Q. You may have. You are not sure, is that right?

A. I believe Poldi was with me when I paid my bill.

By the Court: I can't hear.

By the Witness: I said, I believe my husband was with me when I checked out of the hotel.

By Mr. Downing:

Q. At both hotels, the le Khedive and the Royal Monceau?

A. Yes, he was with me all the time.

Q. And he paid your bills in Paris, is that right?

A. No, that is not right.

Q. And he hasn't been with you all the time since you have been in the United States, though?

A. No, he has not.

By Mr. Downing: You may cross examine. I am through with the witness.

869

Cross Examination by Mr. Eben.

Q. Mrs. Knoll, when you arrived in Paris in 1947 the latter part of the year you and your husband-to-be,

Leopold Knoll, had a number of conversations, didn't you?

A. Yes.

Q. Do you recall a specific conversation in which you told Leopold Knoll that you did not think that you would go ahead with the marriage?

A. I don't remember.

Q. For the purpose of refreshing your recollection, do you recall any occasion in Paris prior to your marriage to Leopold Knoll when he told you that if you did not intend to marry him and remain married to him, that he did not want to go ahead with the marriage, and if it was just your purpose in coming over to France to marry him, to get him into the United States, and that was all, he didn't want to marry you?

A. That was not what he wanted.

Q. Pardon?

A. That was not what he wanted.

Q. I can't hear.

870 A. Leopold wanted me for his wife, and he always has and he still does.

Q. Did he tell you that in Paris?

A. Yes, he did.

Q. At that time you said to him that you wanted to think it over, didn't you?

A. Yes, I did.

Q. And Miss Bess Osborne was present at that particular conversation, wasn't she?

A. Yes, she was.

Q. And isn't it a fact that after Leopold told you that he wanted to marry you, and marry you for permanent purposes, if I may paraphrase what you have just said, that you left the room for a short time to consider the whole matter, isn't that true?

A. Yes.

Q. Did that happen at the Hotel le Khedive?

A. Yes, it did.

Q. And you thought the matter through, did you not?

A. Yes, I did.

Q. And then you returned to the room where Leopold was, isn't that a fact?

A. Yes.

Q. And did you then tell him that you would marry
871 him for all time to come?

A. Yes, sir, I did.

Q. And he said he would go through with the marriage then, is that right?

A. Yes, sir.

Q. And that he would marry you?

A. Yes.

Q. All right. That marriage was consummated, was it not?

A. Yes, sir.

Q. In Paris?

A. Yes.

Q. And since April 1, 1950, which is an arbitrary date that the District Attorney has picked—

By Mr. Downing: Object to the characterization as arbitrary.

By the Court: Strike it out.

By Mr. Eben:

Q. Since April 1, 1950, concerning which date you testified in response to questions put to you by the District Attorney, you have lived with your husband as man and wife, haven't you?

A. Yes.

Q. On a number of occasions?

872 A. Yes.

Q. And here in Chicago, is that true?

A. Yes.

Q. Do you and Leopold intend to live as husband—
Strike that.

Do you intend to live with Leopold as his wife permanently?

By Mr. Downing: I object.

By the Witness:

A. I certainly do.

By Mr. Eben: I think it is most material, particularly in view of the cross examination.

By the Court: Yes, I think she may answer.

By Mr. Eben: Thank you.

By the Court: No, don't thank me. I am just giving you a ruling.

By Mr. Eben. All right, I won't.

By Mr. Eben:

Q. Will you answer the question, please?

A. Will you ask it again, please?

Q. Pardon?

A. Will you ask me the question again?

By Mr. Eben: Will you repeat the question, Mr. Reporter?

873 (Whereupon the following question was read by the reporter:

"Q. Do you intend to live with Leopold as his wife permanently?")

By the Witness:

A. I intend to exert every energy to make Leopold a very good wife.

By Mr. Eben:

Q. Has Leopold indicated his intention to live with you?

A. Yes, he has.

Q. When you arrived in this country an application for admission to the United States was filled out on behalf of Leopold Knoll which application has been marked Government's Exhibit 3, is that right?

A. Yes.

Q. Is that Leopold's signature which appears thereon?

A. This one is.

Q. At the bottom?

A. Yes.

Q. Were you present when that signature was affixed?

A. Yes, I was.

Q. Do you know who placed on that particular exhibit the writing which appears in red ink?

874 A. No, sir.

Q. For the purpose of refreshing your recollection, was that placed on there by the Immigration Inspector before whom you and Leopold appeared?

A. I don't know whether Leopold filled it out or the Inspector.

Q. Do you recall, Mrs. Knoll, what happened when you and Leopold arrived on the plane at La Guardia Air Port in New York?

A. Yes, sir, I do.

Q. You were met by an Immigration Inspector, were you?

A. That is correct.

Q. And you were taken to his office, or to an office?

A. Yes.

Q. And at that place the Immigration Inspector put questions to you and Leopold, did he not?

A. That is right.

Q. Did you make the answers to those questions, or did Leopold?

A. To those he directed me to.

Q. Beg your pardon?

A. To the questions he directed to me, I answered.

Q. Do you know whether or not the information 875 which appears on Government's Exhibit 3 was obtained from you or from Leopold or both?

A. I think both, sir, because Leopold had language difficulties.

Q. Excuse me?

A. Leopold had language difficulties and I would try and translate for him.

Q. After that document was signed it was given to the Immigration Inspector, isn't that true?

A. I believe so.

Q. And then you and Leopold entered into the country?

A. That is right.

Q. Is that right?

A. Yes.

Q. That occurred in La Guardia Air Port in New York City, did it not?

A. Yes, it did.

Q. Leopold was sick, was he not, coming over?

A. Yes, very sick.

Q. What was the matter with him, if you know?

A. He was very air sick.

Q. It was his leg—

A. He has a bad leg, too.

Q. Excuse me?

876 A. He has a bad leg, too.

Q. And when he arrived on this side of the water it was necessary, was it not, for him to receive a hospital and doctor's care, isn't that true?

A. Yes.

Q. And as a result Leopold was taken by his family to Florida?

A. Yes.

Q. Upon his arrival here, isn't that right?

A. Yes.

Q. Now, you went on to California with Miss Turner?

A. Yes.

Q. You went there, did you not, for the purpose of going to school, isn't that true?

A. No, it is not true.

Q. What was the purpose of your going there?

A. I went because I was very much upset by what happened between my husband and myself.

Q. Between whom?

A. Between Leopold and myself, and it was my hope to get away from my family and for us to start living together alone.

Q. What were these alters that occurred to which you have just referred?

877 A. Mr. Eben, when two people marry, there are adjustments that have to be made. I was not able to make mine at that time.

Q. You could not make those adjustments with Leopold while your family and his family were around; is that correct?

A. Yes.

Q. You went on to California, is that true?

A. Yes.

Q. And you were eligible under the GI Bill of Rights to go to school out there, were you not?

878 A. Yes.

Q. And you are going to school?

A. Yes.

Q. Under the G.I. Bill of Rights, is that right?

A. Yes.

Q. You were a WAC during the war, were you?

A. Yes, sir.

Q. You enlisted?

A. Yes.

Q. And served for a number of years?

A. Two years and two months, I think.

Q. What courses are you taking out there? You were teaching, or taking courses in teaching?

A. Yes, majoring in—

Q. Do you intend to be a teacher?

A. Leopold wants me to continue school, but I want to stay home with him.

Q. Leopold came back here to Chicago after he had received doctor's care, did he not?

A. Yes.

Q. Did you hear from him from time to time?

A. Yes, I did.

Q. And he sent you what money he could, didn't he?

A. Yes, he did.

879 Q. And you corresponded with him, did you not?

A. Yes, I did.

By Mr. Eben: I have only one or two more questions.

Q. You are here under a subpoena from the Government, are you not?

A. Yes, I am.

Q. When did you arrive, approximately?

A. January 3rd, I think.

Q. Since you have been here, you have been in the office of the United States Attorney here on a number of occasions, have you not?

A. Yes.

Q. Virtually every day, isn't that true?

A. Every day but yesterday, I think.

Q. And while you were there did you undergo interrogation?

A. I spoke to Mr. Downing in his office.

Q. And also Mr. Lawson?

A. Yes.

Q. He is the gentleman who usually sits behind Mr. Downing?

A. Yes.

Q. And you told them, did you not, substantially
880 what you have told the jury here today?

A. Yes, I have.

Q. On any number of occasions, haven't you?

A. Yes, sir.

Q. And all the answers you made to questions that Mr. Downing put to you, in so far as he previously asked you those questions, were the same as you made today?

A. Yes.

Q. Did he ask you anything today that he had not asked you in his office?

A. He did not ask me a great deal in his office.

Q. Excuse me.

A. We spoke very little when I was in his office. Talked about school and the theater, and how I am, and so forth.

Q. But he didn't discuss your testimony very much with you?

A. He asked me if there was anything further I had to tell him, and I said "No".

Q. When he said "further", to what was he referring, to previous testimony given by you?

A. I assume that is what he meant.

Q. All right. Were you told by anyone in the District Attorney's office or in the Immigration or Naturalization Service not to see your husband while you were here?

A. No, sir, I was not.

By Mr. Eben: That is all.

By Mr. Bartoline: No cross examination.

By Mr. Sokol: No cross examination.

By Mr. Downing: Any cross examination?

Recross Examination by Mr. Downing.

Q. In fact, you were subpoenaed to appear here on January 8th and not January 3rd, isn't that right?

A. Yes, sir, it is.

Q. In fact, you only talked with me once since you have been here, January 8th, on Tuesday evening?

A. Yes.

Q. (And the only other times you have been down there have been merely to check in, in order that you might get your statutory allowances as far as being a witness is concerned, isn't that correct?

A. Yes.

Q. And at that time you were down there I told you you did not have to say anything to me about this matter unless you voluntarily wanted to, is that right?

A. Yes.

Q. And at the time you were down there, you told me you wanted to know how soon you could get back because you had to take some examinations, some of them commencing on the 14th, but we later said it was the 15th, and you wanted to start the second semester, is that right?

A. No, sir. I asked you if you knew when I would be able to leave, because if I wasn't there on time for my examinations, I want to notify my instructors.

Q. That is substantially what I said, isn't that right?

A. I think it is a little different.

Q. You put it your way and I will put it my way. We had that conversation, isn't that right?

A. Yes.

Q. And at that time you were not questioned by me at all concerning this matter other than what I have indicated?

A. No.

Q. In fact, Mr. Lawson and I talked about the weather in California and your school?

883 A. It was a very courteous visit.

Q. In fact, all of our visits have been courteous, isn't that right?

A. That is true.

Q. Since April 1, 1950, what have you been doing about making a good wife for Leopold Knoll?

A. I have written him, I have urged him to take care of himself and I told him to have faith that this will be over and it will come out all right and the two of us will have a life together.

Q. He hasn't lived in Los Angeles since April 1, 1950, has he?

A. No, he hasn't.

Q. Now, prior to today you have talked to Mr. Eben about this matter, haven't you.

A. Not since I have been in town, no.

Q. Before then you had told him on other occasions that you have been in town since April 1, 1950?

A. If I remember correctly, I think I have seen Mr. Eben only once before.

Q. And you have talked to Mr. Watt quite a few times?

A. Yes, sir.

Q. About this matter?

A. I think I saw Mr. Watt in his office only once, too.

884 Q. But you talked to him in general about this matter?

A. Yes.

Q. And you have talked to Leopold Knoll about this matter up until the recess today?

A. No, Leopold doesn't talk to me about this.

Q. You have been talking to him?

A. I am living with him.

Q. You have been talking to him about other matters or about this matter up until recently—

A. Not about this matter.

Q. But you have been talking to him constantly since you have been back in Chicago, isn't that right?

A. Yes.

By Mr. Downing: That is all.

By Mr. Eben: A few questions.

Recross Examination by Mr. Eben.

Q. In view of the fact that you and Mr. Downing only talked about the California weather, which I agree is probably much better than we have here, did you ask him why he had brought you here?

A. No, sir.

Q. And did he say why?

A. No, sir.

885 By Mr. Eben: That is all.

By Mr. Downing: That is all.

Does the Court have any questions?

By the Court: No.

(Witness excused).

By Mr. Eben: May I have just a moment, your Honor?

By the Court: Yes.

By Mr. Downing: At this time, the Government would like to offer in evidence Government's Exhibit 4 marked for identification, which is under the seal of the Department of State, and which purports to be a photostatic copy of a passenger application of Regina Treitler.

I will do these all at once and then they can make their record.

Government's Exhibit 5, marked for identification, under the seal of the Department of State, which purports to be a photostatic copy of the Department of State, passenger application of Max Marcel Lutwak.

Government's Exhibit 6, marked for identification, which is under the seal of the Department of State, 886 purporting to be a photostatic copy of the Department of State passenger application of Grace Klemmer, which contains an affidavit of identifying witness of Max Marcel Lutwak.

Government's Exhibit 7, marked for identification, under the seal of the Department of Justice, Immigration and Naturalization Service, which purports to be a list or manifest of outbound passengers, aliens and citizens, for immigration officials at port of departure, for the S. S. Marine Tiger, sailing from New York, New York, July 21, 1947, bound for LeHavre, France, containing on line 1 thereof the name in full of Lutwak, Max M.

Government's Exhibit 10, marked for identification, under the seal of the Department of Justice, containing a photostatic copy of what purports to be the list or mani-

est of the alien passengers for the United States Immigrant Inspector at Port of arrival, S. S. Queen Mary, New York, September 9, 1947, which contains the name of a full of Lutwak, Max M., and Lutwak, Maria I., and additional information pertaining to each of those particular individuals.

Government's Exhibit 11, marked for identification, under the seal of the Department of Justice, Immigration and Naturalization Service, which purports to be a photostatic copy of the document, containing herein the passenger manifest dated November 12, 1947, originated at Brussels, destined to New York, La Guardia, containing the information thereon, on line 8, of Romankiewicz, Z., and line 9, Osborne, Bessie Romankiewicz, and additional information applicable to each of those two.

At this time we would like to move for the admission of each of these documents, heretofore enumerated.

By Mr. Sokol: As to number 4, which I believe bears Mrs. Reitler's signature, I have no objection to it going in.

With respect to those exhibits which do not bear Mrs. Reitler's name, I have a general objection with respect to their materiality:

By Mr. Gerber: As to Exhibit 11, on behalf of Munio Knoll, I have no objection to it going in. It concerns him and Mrs. Bessie Romankiewicz.

As to all the other exhibits he is now offering, I have the same objection, that they are immaterial and inadmissible against Munio Knoll.

By Mr. Bartoline: If the Court please, I have no objection to Exhibit 6, which bears Marcel Lutwak's signature, and also to No. 5, which also bears his signature. But I do object to 7 and 10, because they do not bear his signature, and I do not know that the information on there introduced properly. These are photostatic copies of something we know nothing about.

By Mr. Downing: They are photostatic copies of records which are admissible under the seal of the Department of Justice, Immigration and Naturalization Service, having jurisdiction over those records.

By Mr. Eben: They might be verified. The certification only says that this is a document that they had. That does not prove the authenticity of anything contained in there. There might be any number of people with those names.

By Mr. Downing: It is corroborated by testimony in the record.

By Mr. Eben: I have objections to all of them on the ground that they are immaterial and irrelevant and not competent as against my client.

By the Court: Any other objections?

The objections may be overruled and the exhibits will be received.

889 (Said exhibits, so offered and received in evidence, were respectively marked Government's Exhibits 4, 5, 6, 7, 10 and 11.)

By Mr. Downing: I have one more witness, who will take a short time.

By the Court: How long?

By Mr. Downing: I am ready to put him on. He should not take very long.

BEN J. TUNICK, called as a witness herein, on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Downing.

Q. Will you state your name, please?

A. Ben J. Tunick.

By the Court: How do you spell that?

By the Witness: B-e-n J. T-u-n-i-c-k.

By Mr. Downing:

Q. What is your address, sir?

A. 229 South Central avenue, Chicago.

Q. What is your business or occupation, please?

A. I am Cashier of the Sears Community State Bank.

Q. Where is that located, sir?

890 A. Homan and Arthington, Chicago.

Q. Chicago. Approximately how long have you been associated with that bank?

A. About twenty-five years, twenty-six.

Q. Will you explain briefly to the Court and jury the nature of your duties as cashier of the bank?

A. I am custodian of all records and operations of the bank.

Q. As custodian of the records of Sears Community Bank, are you acquainted with all the records made in the regular course of business of that bank?

A. I am.

Q. And you have been subpoenaed here to produce certain bank records concerning the account known as Grace Klemtner and/or Zelda Klemtner, is that right?

A. That is right.

Q. Do you have those documents with you that were indicated in the subpoena?

A. That is right.

Q. Do you have those documents with you that were indicated in the subpoena?

A. That is right, sir.

By Mr. Downing: I ask the Reporter to mark these Government's Exhibits 26, 27 and 28 for identification.

(Said documents were respectively marked Government's Exhibits 26, 27 and 28 for identification.)

By Mr. Downing:

Q. You have handed me here three documents which have been identified as Government's Exhibits 26, 27 and 28, each marked for identification. I ask you to look at them and ask you if those are records of the Sears Community Bank?

A. That is right. These are the bank's original records.

Q. With respect to each of these three documents, were each of those three documents, records which were prepared in the regular course of business of the bank?

A. Right.

Q. And was it the regular course of business of the Sears Community Bank to prepare such records at or about the time each of those documents were prepared?

A. That is right.

Q. Are these records which I have just shown you in your custody at this time?

A. Right.

Q. And they have been in your custody up to this date, is that right, sir?

A. That is right.

Q. Directing your attention to Government's Exhibit 26, marked for identification, without reciting the details thereon, will you explain briefly to the Court and jury what that document is?

A. This is the ledger record of the account showing the deposits and withdrawals made during the lifetime of this account.

Q. With respect to the first date in the upper left hand column, does that indicate the date the account was opened?

A. That is right. The account was opened March 5, 1947.

Q. Now, directing your attention to Government's Exhibit 27, marked for identification, I ask you to look at that and explain briefly to the Court and jury what that record is.

A. This is a signature card. At the time the account is opened the customer signs his or her name on this card for the bank's record.

Q. With respect to Government's Exhibit 28, marked for identification, I ask you to look at that and explain briefly to the Court and jury what that record is.

893 A. This record is a change of this account from a joint ownership—from an individual account to a joint ownership. In other words, another name was added to this account.

Q. And on what date was that other name added to the account?

A. April 7, 1937, this account was changed to a joint account.

Q. And does the name appearing on Government's Exhibit 27, marked for identification—is that the name under which the account was originally opened?

A. That is right.

Q. And that is the name it was known as when it was a single account, is that right?

A. Yes. It was known as Grace Klemtner and/or Zelda Klemtner.

Q. And the "and/or Zelda", was added approximately when?

A. On April 7, 1947.

Q. By inspection of this document, can you determine approximately what date that account was closed?

A. Yes. This account was closed, according to our record, July 9, 1949.

894 Q. With respect to each of these records, are they true and correct records of the Sears Community Bank, Chicago, Illinois?

A. They are.

By Mr. Downing: If your Honor please, the Government at this time would like to offer in evidence Govern-

ment's Exhibits 26, 27 and 28 each marked for identification, and ask leave of court to substitute photostats, in lieu of the originals, so that the originals may be returned to the witness.

They may cross examine.

By Mr. Eben: May I have a chance to examine them?

By Mr. Gerber: I object to their admissibility, on behalf of Munio Knoll, your Honor.

Cross Examination by Mr. Eben.

Q. Mr. Yunick—

A. Tunick.

Q. Excuse me?

A. Tunick.

Q. Oh, T, Tunick?

A. Yes.

Q. Tunick, Tunick.

95 A. Yes.

Q. Mr. Tunick, I show you Government's Exhibit o. 26 for identification, which you have identified as a ledger card. Will you tell the Court and jury in a general way how the figures which appear on that exhibit got there?

A. Well, these entries on this ledger card were posted on this card from deposits or withdrawals made during banking hours.

Q. And the withdrawals, how do they get on there?

A. They are posted from signed receipts that the customer takes out of the bank at the time they come in to withdraw.

Q. There have been occasions, have there not, in the Mars Community State Bank, where adjustments had to be made on ledger cards such as this exhibit, because of a mistake, or other?

A. Yes, occasionally there might be a mistake.

Q. And that happens with all banks, doesn't it?

A. As a rule.

Q. And the adjustment is made on the ledger card, so as to truly reflect the state of the account?

A. Yes. Any corrections would show on this ledger card.

Q. In examining that card, can you state whether or not a withdrawal was made on this account on or about the 20th of August, 1947?

A. That is right.

Q. Beg your pardon?

A. That is right, there was a withdrawal.

Q. In what amount?

A. August 20, 1947, of \$1250.

By Mr. Eben: That is all.

Redirect Examination by Mr. Downing.

Q. By examining that, can you locate any withdrawal in the amount of \$1,000 even on any day?

A. No, not on this account.

By Mr. Downing: That is all.

By Mr. Eben: I have two more questions.

Recross Examination by Mr. Eben.

Q. Assume that there was a withdrawal of \$1,000 and \$250 on that date. Would they appear separately or together?

A. Yes, they would appear separately.

Q. But that amount was drawn on that date?

A. \$1250, yes.

By Mr. Eben: That is all I have.

897 By Mr. Downing: That is all.

By the Court: Any objection?

By Mr. Gerber: As I have stated, I object as to Munio Knoll as to the admissibility of the exhibits. I didn't get a ruling on my objection.

By Mr. Eben: I object also as to Leopold Knoll.

By Mr. Sokol: Objection.

By the Court: What?

By Mr. Sokol: Objection.

By the Court: Overruled.

By Mr. Downing: May they be received?

By the Court: They may be received.

By Mr. Downing: May we have leave to substitute photostats?

By the Court: Any objection to substituting photostats?

By Mr. Eben: None by me as to the substitution.

By Mr. Gerber: No.

898 (Which said documents, so offered and received in evidence, were marked, respectively, Government's Exhibits 26, 27 and 28.)

By Mr. Downing: I would like to read a few documents.

May we have a little recess.

By the Court: Yes, take a short recess.

(Recess taken.)

(Whereupon the following proceedings were had out of the presence and hearing of the jury:)

By Mr. Downing: If your Honor please, I would like to have leave to read from exhibits, some of which I have not read as yet.

But before I get to reading the balance of the statements, as I have previously indicated, I have some questions and answers marked.

By the Court: Yes.

By Mr. Downing: I have other documents I would like to read, and I was wondering if the Court was interested in reading the balance of the statements while I am 899 reading the other documents.

By the Court: You indicated on this other one that there were certain questions and answers you thought ought to be eliminated. Counsel said, "No, they must all be read."

They forced me to read through and check it.

If counsel takes the same attitude I will have to read it.

Counsel afterwards read it and said, "That is right."

If counsel will do me the favor to tell me whether they really object to those or what they want done with them, we can save time.

By Mr. Sokol: Your Honor told me the other day that you would not make eliminations on my two exhibits. Is your decision still the same?

By Mr. Downing: I think there have been a couple of questions—I will give them to you to look at them; but there have been no changes on any of the others. That is, on Lutwak or Leopold Knoll, both of which counsel have seen themselves.

900 By Mr. Bartoline: I understand Mr. Downing is not going to read three questions on page 19 of Government's Exhibit 15, immediately after the words, "Inspector Lawson to Deponent," that the first three questions will not be read, and those are the only ones.

By the Court: Do you object to his eliminating those?

By Mr. Bartoline: No.

By the Court: Has anybody else an objection?

By Mr. Sokol: Now—

By the Court: Has anybody else an objection to the elimination?

By Mr. Gerber: Munio Knoll requests an instruction that none of the questions will be considered as to him.

By the Court: Does anybody have any objection to Mr. Downing's refraining from reading those three questions and answers?

By Mr. Bartoline: I now see an additional one which I have not seen before, an additional two.

901 It is all right. I have no objection to those two, and they are the last two questions and answers on page

By the Court: Does anybody else want those read, or are you willing to have them left out?

By Mr. Sokol: I don't know. I haven't seen them.

No, I have no objection on that.

By the Court: I understand no one of the defendant has any objection to Mr. Downing's refraining from reading the questions and answers which he discussed with Mr. Bartoline.

By Mr. Sokol: As to mine, 16 and 17, I am informed now there is one question on page 2—this is 1—

By Mr. Downing: The statement, and that question—

By Mr. Sokol: On 17, and this one here on page 2 of Exhibit 16—

By Mr. Downing: That is right.

902 By Mr. Sokol: I have no objection to the elimination of these two.

By the Court: Does anybody have any objection?

Mr. Eben: I have no objection to the elimination of questions.

By the Court: I want to make a record on your gentlemen, if you please. You are very technical. Is there any objection to the one Mr. Sokol—

By Mr. Eben: I have no objection to the deletion of questions.

By the Court: Nobody has. Now, what is this?

By Mr. Eben: With respect to Government's Exhibit 18, which purports to be a statement given by Leopold Knoll my position is that the exhibit is in, and it is in its entirety.

By the Court: You want it all?

By Mr. Eben: I want it all.

By the Court: All right, let it all be read.

955 By the Court: Let me speak to counsel. I suggest such if any suggestions with respect to instructions as counsel may desire to make, let them be presented in writing at the opening of court Monday with copies for your opponents.

I should be glad if the defendants' counsel combine in their suggestions, and let the Government's suggestions be marked in pencil at the lower righthand corner, and 956 let their suggestions be numbered 1, 2, 3 and so forth.

Let the defendants' suggestions be lettered A, B, C.

By Mr. Downing: Yes, sir.

By the Court: I should like to have your suggestions Monday morning when you come in.

By Mr. Downing: Yes, sir.

By the Court: Don't put any citations or any markings or any numbers other than just in pencil at the lower righthand corner as I have indicated.

By Mr. Downing: Yes, sir.

(Whereupon an adjournment herein was taken to 10:00 o'clock a. m. Monday, January 15, 1951).

965

• • (Caption—No. 50 CR 464) • •

Chicago
Monday,
Chicago, Illinois,
Monday, January 15, 1951,
10:15 o'clock a. m.

Met pursuant to recess.

Present:

Mr. Downing
Mr. Owen
Mr. Gerber
Mr. Bartoline
Mr. Sokol
Mr. Eben
Mr. Watt
Mr. Weissbourd

And Thereupon the following further proceedings were had herein:

By the Clerk: Case on trial.

(The following proceedings were had out of the presence of the jury:)

By Mr. Downing: If your Honor please, you asked us to bring in instructions. Some of these may not be applicable because I don't know what the defendants are going to do.

966 By the Court: Very well.

By Mr. Eben: The situation with respect to the instructions is this, your Honor, that Mr. Gerber has some instructions and Mr. Sokol has some instructions and also I have some, and there are others which are going through the typewriter in my office another five or six or seven instructions which I would like to submit when they come over. My secretary will bring them over as soon as they are finished, and we will submit what we have to the Court.

We are trying to get together on the lettering, in accordance with your Honor's instructions last Friday. As soon as we do that we will hand them to the court.

By the Court: Have you gentlemen conferred to see whether you have duplicates?

By Mr. Gerber: We have not had an opportunity to confer yet.

By the Court: Look them over, to that end.

By Mr. Gerber: We would have to sit down, your Honor, and compare each others' instructions.

By the Court: When can you do that?

By Mr. Gerber: We can do it now, if your Honor 967 wishes to give us the time. Mr. Eben hasn't got all his over here. We can get together now, if your Honor wishes.

By the Court: Suppose we go on and you can do it at noontime.

By Mr. Sokol: That is fine.

By the Court: Unless we come to a time where we need them; if we do, we will have to take the time to look at them. Bring in the jury.

By Mr. Downing: Your Honor, there is one correction in the record on page 711 of the record, line 1, shows in connection with the testimony of Bess Osborne: "Now, directing your attention to Government's Exhibit 1"—it should be Government's Exhibit 11.

By the Court: Any objection to the correction?

By Mr. Gerber: No objection.

By Mr. Sokol: No objection.

By Mr. Eben: No objection.

By the Court: Let it be made. Bring in the jury.

(The following proceedings were had in the presence and hearing of the jury:)

By the Court: Does anybody have a transcript of the testimony of Maria Lutwak.

1008 By Mr. Eben: May we have an instruction, your Honor, that the last statement read is limited to the person who made the statement?

By the Court: Yes. That was the statement of whom, Mrs. Treitler?

By Mr. Downing: Mrs. Treitler, your Honor..

By the Court: Ladies and gentlemen, the statement which has just been read, and which appears to have been made by the defendant Regina Treitler, is admissible and is received only against the defendant Treitler. It is not to be considered by you against any other defendants.

By Mr. Downing: Let the record show I am reading from Government's Exhibit 18 in evidence.

1060-1061 At this point, if your Honor please, the Government would like to make a motion, in order to clear the record; that all of the Government's Exhibits, 1 through 28, inclusive, some of which have heretofore been admitted only as against certain defendants, be now admitted against all the defendants, in order that the record may be clear.

By the Court: What are those exhibits?

By Mr. Downing: Exhibit No. 1—

By the Court: Maybe I can go through them quicker.

By Mr. Downing: Yes.

By the Court: Are they in order now?

By Mr. Downing: I believe they are, yes, sir, your Honor.

1062 By the Court: Government's Exhibit 1 may be admitted against all the defendants.

(Said exhibit, so offered and received in evidence, was marked Government's Exhibit 1.)

By the Court: Government's Exhibit 2 may be admitted against all of the defendants.

(Said exhibit, so offered and received in evidence, was marked Government's Exhibit 2.)

By Mr. Eben: I would like the record to show my continuing objection in connection with all of these exhibits.

By Mr. Gerber: The same objection.

By the Court: Very well.

By Mr. Sokol: Same objection.

By the Court: Very well.

Government's Exhibit 3 may be admitted as against all of the defendants.

(Said exhibit, so offered and received in evidence, was marked Government's Exhibit 3.)

By the Court: Government's Exhibit 4 may be admitted against all of the defendants.

(Said exhibit, so offered and received in evidence, was marked Government's Exhibit 4.)

By the Court: Government's Exhibit 5 may be admitted against all of the defendants.

(Said exhibit, so offered and received in evidence, was marked Government's Exhibit 5.)

By the Court: Government's Exhibit 6 may be admitted against all of the defendants.

(Said exhibit, so offered and received in evidence, was marked Government's Exhibit 6.)

By the Court: How many are there on this next one?

By Mr. Downing: I believe on that one there is just one, line 1.

By the Court: Government's Exhibit 7 may be admitted against all of the defendants.

(Said exhibit, so offered and received in evidence, was marked Government's Exhibit 7.)

By the Court: Government's Exhibit 8 may be admitted against all of the defendants.

(Said exhibit, so offered and received in evidence, was marked Government's Exhibit 8.)

By the Court: Government's Exhibit 9 may be admitted against all of the defendants.

(Said exhibit, so offered and received in evidence, was marked Government's Exhibit 9.)

By the Court: Government's Exhibit 10 may be admitted against all of the defendants.

(Said exhibit, so offered and received in evidence, was marked Government's Exhibit 10.)

By the Court: Government's Exhibit 11 may be admitted against all of the defendants.

(Said exhibit, so offered and received in evidence, was marked Government's Exhibit 11.)

By the Court: Government's Exhibit 12 may be admitted against all of the defendants.

(Said exhibit, so offered and received in evidence, was marked Government's Exhibit 12.)

By the Court: Government's Exhibit 19 may be admitted against all of the defendants.

(Said exhibit, so offered and received in evidence, was marked Government's Exhibit 19.)

By the Court: Government's Exhibit 21 may be admitted against all of the defendants.

(Said exhibit, so offered and received in evidence, was marked Government's Exhibit 21.)

By the Court: Government's Exhibit 20 may be admitted against all of the defendants.

(Said exhibit, so offered and received in evidence, was marked Government's Exhibit 20.)

By the Court: Government's Exhibit 22 may be admitted against all of the defendants.

(Said exhibit, so offered and received in evidence, was marked Government's Exhibit 22.)

By the Court: Government's Exhibit 23 may be admitted against all of the defendants.

(Said exhibit so offered and received in evidence, was marked Government's Exhibit 23.)

By the Court: Government's Exhibit 25 may be admitted against all of the defendants.

(Said exhibit, so offered and received in evidence, was marked Government's Exhibit 25.)

By the Court: Government's Exhibit 24 may be admitted against all of the defendants.

(Said exhibit, so offered and received in evidence, was marked Government's Exhibit 24.)

By the Court: Government's Exhibit 28 may be admitted against all of the defendants.

(Said exhibit, so offered and received in evidence, was marked Government's Exhibit 28.)

By the Court: Government's Exhibit 27 may be admitted against all of the defendants.

(Said exhibit, so offered and received in evidence, was marked Government's Exhibit 27.)

1066 By the Court: Government's Exhibit 26 may be admitted.

(Said exhibit, so offered and received in evidence, was marked Government's Exhibit 26.)

By the Court: You may take a short recess, ladies and gentlemen.

(Whereupon the following proceedings were had out of the hearing and presence of the jury:)

By the Court: Government's Exhibit 13 is an examination of Zyginunt Romankiewicz before the Immigrant Inspector on November 24, 1948.

Government's Exhibit 14 is the examination of Zygmunt Romankiewicz before the Immigrant Inspectors on January 4, 1949.

Government's Exhibit 15 is the examination of Marcel Max Lutwak before the Immigrant Inspectors on December 30, 1948.

Government's Exhibit 16 is the examination of Mrs. Regina Treitler before the Immigrant Inspector, December 9, 1948.

Government's Exhibit 17 is the examination of Mrs. Treitler before the Immigrant Inspectors on January 6, 1949.

Government's Exhibit 18 is the examination 1067 of Leopold Knoll before the Immigration Inspectors on December 2, 1948.

Now, I have in mind that the indictment charges that this was a continuing conspiracy and that it was a part of the conspiracy to conceal the facts from the Government, and I have no doubt it was, and it might be and it may be that these exhibits are receivable generally against all of the defendants. But I think I am inclined to the opinion that it would be well to limit these exhibits as they have heretofore been limited by the Court, and that limitation has made them admissible only, and they have been received, as against only the persons who made the statements respectively, and I think it would be well—do you, on behalf of the Government—

By Mr. Downing: We are not going to press the point.

By the Court: On the part of the Government, do you feel strongly they are admissible against all?

By Mr. Downing: Our observation is the same as you have mentioned it, that it is a continuing conspiracy and that it was a part, as is pleaded in the indictment, and as I think the facts prove, a part of this conspiracy to 1068 hide the true existence of the facts, and therefore,

under that theory, I would say that they are admissible against all, because these statements were made—

By the Court: Maybe the defendants want these in.

Is there any defendant who wants the statements of the other defendants to go in? If there is, just speak up.

By Mr. Eben: No, I object.

By Mr. Gerber: No, I object.

By Mr. Eben: I object to the other statements going in against my defendant.

By the Court: Very well. Then they will be admitted—does any counsel feel otherwise?

(No response).

By the Court: I understand that counsel do not desire these to go in. Therefore, they will be admitted against the defendants who made them respectively, and the jury have been heretofore advised to that effect.

(Said exhibits, so offered and received in evidence, were marked, respectively, Government's Exhibits 13, 14, 15, 16, 17 and 18.)

By Mr. Downing: There is one additional factor that I would like to mention at this time, inasmuch as the jury is not here, and there might be some discussion on it.

There has been testimony, of course, of Anne Zapler. You have advised the jury in connection with that.

There is now the testimony of Maria Irene Lutwak, and the Government is moving it be admissible against all the defendants. I think heretofore it has been limited with respect to its receipt.

And there has been testimony by the witness Jane Turner and the witness Mrs. Louis Wickers, which I submit is admissible against all the defendants.

And there is also testimony, I submit, as a part of this conspiracy of Joseph Ludmer and Morris Haberman, which likewise should be admissible against all of the defendants, and I am now moving that their testimony be likewise admitted against all of the defendants except—

By the Court: I want to look at that particularly. I want to look at the parts.

By Mr. Downing: Yes.

By the Court: I think the testimony of Maria Irene Knoll, or Lutwak, whatever her name is, is admissible, generally against all of the defendants.

1070 By Mr. Sokol: If your Honor please, there is no connection between Mrs. Treitler and the witness Maria. The testimony from all the Government witnesses—

By the Court: We have been over this for a week. We must not spend too much time on it now. I think it is admissible and I so rule.

By Mr. Sokol: I would want to record an objection.

By the Court: You record it.

By Mr. Sokol: I would like a chance to convince your Honor otherwise.

By the Court: You have had a week.

By Mr. Sokol: I have not had a chance to argue it at all, but I will renew it later.

By the Court: What is that other witness?

By Mr. Downing: Jane Turner is the witness. I have her testimony here also, your Honor.

By the Court: You spoke of Ludmer.

1071 By Mr. Downing: There is Joseph Ludmer. His testimony is one of those books.

By the Court: I was looking at it. I have no doubt about it being admissible against all the parties who participated in the conversation but I doubt if the conversation was in furtherance of the conspiracy. That has been the ruling before the jury, and I think I will adhere to that.

By Mr. Downing: The testimony of Jane Turner.

By Mr. Eben: She testified she went to the air port and met Grace Knoll and Leopold Knoll when they arrived. There was a conversation at the time they arrived, and she went back to the Governor Clinton Hotel in New York.

That will probably refresh your Honor's recollection on it.

By the Court: Are you about through now, Mr. Downing?

By Mr. Downing: I will rest as soon as these motions are decided, your Honor.

By the Court: You asked for conversation, and the jury was sent out.

By Mr. Downing: No, it was not a conversation.
1072 It was just the actions. I am not interested in the conversation.

I think Mr. Eben mentioned the conversation. I withdrew the question about the conversation. She testified

as to facts concerning Grace Klemtner, and also about Leopold Knoll, Munio Knoll and Marcel Lutwak, in New York.

By the Court: I don't see the limitation. Did I limit it?

By Mr. Downing: I was not sure, and I wanted to make sure, especially the testimony regarding Grace Klemtner, if it was limited, I wanted to make sure that it was in the record admissible against all, as I think it should be.

By the Court: I will admit the testimony of Miss Turner against the defendants generally.

What else is there?

By Mr. Downing: There are two more. Mrs. Wicker, who testified concerning—I think it is in the same book that you have there, your Honor—

By Mr. Eben: It appears to me from examining your Honor's remarks on page 484 that Mrs. Wicker's 1073 testimony has been admitted generally.

By Mr. Downing: It does not specifically.

By the Court: On page 480 Mr. Downing is contending it is admissible against all of the defendants, and on page 481 I asked for the testimony of Anna Zapler.

By Mr. Downing: That is right, your Honor.

By the Court: Then I overruled the objection to the testimony of Wicker. If there is any doubt about it I am ruling that the testimony of Mrs. Nettie Wicker—and who else?

By Mr. Eben: May the record show our objection—I guess on behalf of all counsel?

By the Court: Yes.

By Mr. Downing: The only other witness I refer to is Morris Haberman. Perhaps he should be classified the same as Mr. Ludmer. His testimony concerned certain transactions, certain conversations and certain events that took place, and it was somewhat—

By the Court: I looked at Mr. Ludmer's testimony this morning, and I think my rulings with respect to his testimony were correct and should not be varied at this time.

1074 I think what was said in his presence could hardly—I have spoken about that.

By Mr. Downing: Yes. And Haberman.

By the Court: Where is Haberman's testimony?

By Mr. Downing: It starts in the back of the one you have, and I have the balance of it here.

By the Court: I will read this over at noon time. We will let the jury go until two o'clock.

By Mr. Downing: Then the Government will rest, your Honor, as soon as those rulings are made.

By the Court: All right.

Get your instructions in shape.

By Mr. Eben: The balance of my instructions came over, and we will have them ready for your Honor.

By the Court: All right.

By Mr. Sokol: May I ask a question, your Honor, for our guidance in working on these instructions?

Will your Honor have any objection if we do not weed out some which may be repetitious of others, since 1075 one counsel may one that is more concise, one counsel might take a short form and the other—

By the Court: Take the better one and send it in. Pick out the best ones, that best suit your purpose.

(Thereupon the further trial of the above-entitled case was recess until 2:00 o'clock p.m. of the same day, January 15, 1951.)

1076

• • (Caption—No. 50 CR 464) • •

Chicago, Illinois,
Monday, January 15, 1951
2:00 o'clock p.m.

Met pursuant to recess.

Present:

Mr. Downing

Mr. Owen

Mr. Gerber

Mr. Bartoline

Mr. Sokol

Mr. Eben

Mr. Watt

Mr. Weissbourd

And thereupon the following further proceedings were had herein:

(Whereupon the following proceedings were had out of the presence and hearing of the jury:)

By the Clerk: Case on trial.

By Mr. Eben: May it please the Court, I submit herewith, for your Honor's consideration, requests to instruct which have been marked A to Y, inclusive.

By the Court: I have examined that testimony of 1077 Morris Haberman. I do not think there should be any broadening of the admissibility of the conversations which he testified to. I think that his testimony to the effect that he attended certain restaurants with Mr. Munio Knoll and Mrs. Maria Irene Knoll should be received as against all of the defendants.

By Mr. Downing: Also, your Honor, I submit that there is testimony concerning his visiting the apartment at 3345 West Maypole, at which time he saw Maria Irene Knoll.

By the Court: Yes, I think that is right.

By Mr. Downing: That should be admissible, and also in New York he testified about seeing them in the same hotel room, in New York.

By the Court: I think his testimony with respect to those matters might properly be considered as against all the defendants.

By Mr. Eben: Let the record show my objection on behalf of Leopold Knoll.

By Mr. Gerber: And mine, on behalf of Munio Knoll.

By Mr. Sokol: Similar objection on behalf of defendant Treitler.

By Mr. Bartoline: Objection on the part of Marcel Lutwak.

By Mr. Downing: There is one other thing, that I 1078 am informed by the Reporter, that in connection with

Government's Exhibit 26 this morning, which your Honor, I believe, included in the group that would be admissible against all the defendants, his record did not show your statement that it was admissible against all, but merely that it was admissible, and that is the—

By the Court: It is admissible against all the defendants.

(Said exhibit, so offered and received in evidence, was marked Government's Exhibit 26.)

By Mr. Eben: Same objection on behalf of Leopold Knoll.

By Mr. Gerber: Same objection on behalf of Regina Treitler.

By Mr. Gerber: Same objection.

By Mr. Bartoline: I object on behalf of defendant Marcel Lutwak.

By Mr. Downing: I have no other points, your Honor. As soon as the jury comes in, I presume the Court will advise the Jury, and then the Government will rest.

By the Court: That divorce decree in the case of Marcel M. Lutwak against Maria Irene Lutwak has been 1079 received as against all the defendants.

By Mr. Downing: Yes. All the exhibits, except for the six statements, Government's Exhibits 13 through 18, have been received as against all the defendants, according to the state of the record.

By the Court: I will now advise the jury that the testimony of Maria Irene Knoll or Lutwak is admissible against all of the defendants; that the testimony of June Turner is admissible against all the defendants; that the testimony of Mrs. Nettie Wickers is admissible as against all the defendants; that the testimony of Morris Haberman which in certain respects was limited to Munio Knoll and Marcel Max Lutwak, and in others to Munio Knoll, will in the following respects be received as against all the defendants:

So far as the testimony of Mr. Haberman related to the identification of photographs, it is admissible as against all the defendants; and so far as it related to the presence of Maria Irene Lutwak or Knoll in the apartment with Munio Knoll in Chicago and so far as it related to the presence of Maria in the room of Munio in New York, it will be received generally.

By Mr. Downing: Yes, your Honor.

1080 By the Court: Bring in the jury.

(Whereupon the following proceedings were had in the presence and hearing of the jury:)

By the Court: Ladies and gentlemen, I have heretofore limited the testimony of Maria Irene Knoll or Lutwak as to certain defendants.

I now instruct you that testimony of Maria Irene Knoll or Lutwak is admissible as against all of the defendants.

The testimony of the witness Jane Turner was limited as to certain defendants. I now instruct you that it is admissible as against all the defendants.

The testimony of Nettie Wickers was limited as to certain defendants. I now instruct you that it is admissible as against all of the defendants.

The testimony of Morris Haberman was limited as to certain defendants. I now instruct you that, so far as that testimony related to the identification of photographs, which photographs have been received in evidence, it is admissible as against all of the defendants.

And so far as the testimony of Mr. Haberman re-1081 lated to the presence of Maria Irene in the apartment with Munio Knoll in Chicago or in his hotel room in New York, it is admissible as against all of the defendants.

By Mr. Downing: If your Honor please, the Government rests.

Whereupon the Government rested its case, in chief.

By Mr. Eben: We desire to present certain motions to the Court.

By the Court: You may step into the jury room, ladies and gentlemen.

(Whereupon the following proceedings were had out of the presence and hearing of the jury:)

By Mr. Eben: May it please the Court, I desire to state at this time that I move, under the proper rule, for acquittal of my client Leopold. I do so for three separate reasons:

First, as to the five substantive counts in the indictment, I believe that venue has not been properly proved here, and that an offense, if any, under the testimony, has been proved in New York.

Secondly, with respect not only to the substantive counts but also as to the conspiracy count, the evidence is 1082 insufficient to show that he was connected with this conspiracy. The evidence which is in the record is susceptible of inferences equally consistent with innocence as with guilt, and under such circumstances, your Honor ought to acquit him here at this time.

And, thirdly, with respect to the conspiracy, the evidence shows that there is not one conspiracy been proved here, and not one conspiracy with many objects, but there have been three separate conspiracies, and therefore Leopold Knoll is entitled to be acquitted because there has been a variance in the proof.

I would like to argue those after the others make their motions also.

I should like to say to the Court also, at this time, so

that your Honor will be informed, that it has become the conclusion of counsel for defendants jointly that on the present state of the record, we will not put in any defense, and upon your Honor's ruling on the motions for acquittal, no evidence will be offered on behalf of the defendants.

I thought I ought to inform your Honor of that, because I know you have plans, and so on.

That decision, incidentally, was not reached until 1083 noontime today, although I myself had decided with respect to Leopold Knoll as late as yesterday, but unanimity was not had with respect to it until noon today. Otherwise we would have informed your Honor of it beforehand.

By Mr. Sokol: I am similarly awaiting the argument with respect to the venue. Additionally, I would like to move, on behalf of Regina Treitler for acquittal as to the indictment in toto. Secondly, with respect to counts 2 to 6, I make a motion for judgment of acquittal, because of the venue matter which will be argued hereafter.

Thirdly, with respect to count 6 in particular, singling that count out, as the evidence in the case shows, the witness and person named in the sixth count, that is, her entry, that is, of Maria Lutwak, had entered this country and had filled out the statement, and that there is no evidence in the record which would in any way associate the defendant Treitler with the entry of the witness Marja Lutwak, or of the assertion made upon her entry.

Those are my motions.

By Mr. Gerber: On behalf of Munio Knoll, if the Court please, same motion for judgment of acquittal is made, 1084 first as to counts 2 to 6, the substantive offense, on the same grounds Mr. Eben has stated and will argue; as to the conspiracy and all the counts of the indictment as a whole, we also move for judgment of acquittal on the same grounds as have been urged, without repeating them, by Mr. Eben.

By Mr. Bartoline: On behalf of Marcel Lutwak, I adopt the motions made by counsel here.

* * *

1199 By Mr. Downing: You overrule my motion where I moved to strike out their motion on counts 2, 3, 4, 5 and 6 on the basis that the venue had been waived? I would like to have the record show you have overruled my motion, just for the purpose of the record.

By the Court: No, they made one motion. I will indicate that you have made a motion. Now, I act upon that. Your answer to that is that it was waived. I will say I do not think there has been a waiver, but I do think that the offenses charged and the offenses proven, if they occurred, occurred in a state other than Illinois, namely, the State of New York and occurred either in the Southern or the Eastern District of New York, and that that question has not been waived by the defendant, but it is now contended by the Government that it has been waived. Therefore, what should be the conclusion?

By Mr. Eben: Did your Honor ask what order should be made in the light of what you have suggested?

By the Court: Yes.

By Mr. Eben: It is my opinion that your Honor 1200 should grant the motion for acquittal heretofore made on behalf of the defendants with respect to counts 2 to 6, inclusive, for the reasons stated in the oral opinion which your Honor has just given.

By the Court: I do not think I will acquit them. I think I ought to dismiss counts 2, 3, 4, 5 and 6 because the counts show and the evidence produced shows that if the offenses were committed at all, they were committed in a state other than Illinois, in a District other than the Northern District of Illinois.

By Mr. Downing: Your Honor, may I make this observation, that I would be in favor of a motion to dismiss those counts, that is, if they are making that motion. Naturally, we do not want any order of acquittal.

By the Court: What do you want? What order do you want?

By Mr. Downing: Well, naturally, under your point of view, I think the proper thing would be to dismiss counts 2, 3, 4, 5 and 6. Of course, the Government is opposed to that, but under your point of view, I think that would be the proper procedure in order to save, if possible, any rights that the Government might have, for two 1201 things. First, ability to secure a decision as to these other counts, and secondly, if possible, to subsequently bring the matter within the proper time to the District of New York, if that is possible.

By Mr. Eben: I do not see how your Honor could consistently do that, in view of the reasoning upon which your

Honor has based his decision, namely, the fact that the evidence here shows that the crimes, as alleged in the subsequent counts, were outside of this District. I understand your Honor is not ruling on the indictment, therefore, I think the proper order is the one I suggested to your Honor.

By the Court: I do not think so. I don't know whether it makes any difference at all, or not. Probably time will take care of the situation, but that is not our case. I think the situation just now is like it was if they came in on a motion to dismiss immediately after the arrest because of improper venue. And after I looked over the indictment, probably I would have had to have just as much argument then as I have had now.

Well, what order do you say I should make?

1202 By Mr. Downing: As I say, your Honor, I think the order should be to dismiss counts 2, 3, 4, 5 and 6 on motion of the defendant.

By the Court: What do you say about this? Motion of defendant—what do counsel for defendants say about this? I think this is what it should be. Motion of defendants, counts 2, 3, 4, 5 and 6 dismissed for want of proper venue.

That will be the order unless I hear some further suggestions, which I do not hear.

By Mr. Downing: If your Honor please, in so far as any suggestions which the Government might have, may I reserve such right to submit such suggestions in the morning, after I have had a chance to discuss this matter a little more thoroughly with the office?

By the Court: Yes.

By Mr. Downing: I think there are problems here which I think we are going to pursue, and I just want to have the right to protect our record in that connection.

By the Court: All right.

By Mr. Sokol: Will you excuse us just a moment?

By Mr. Eben: Will your Honor take a brief recess?

By the Court: Yes.

(Recess taken)

1203 By the Court: Here are some instructions, Gentlemen, which have been drafted which I would like to have you look over, and unless you have some objections to them, I propose to give them.

And in here is an instruction to the effect that the jury are not to take into consideration as against the defendant that he did not testify.

If the defendants do not want that instruction, I will not give it; but if they do want such an instruction, I will give it.

Will you gentlemen look these over?

By Mr. Downing: You gentlemen look them over first. When you are through with them, give them to me and I will then look them over.

By Mr. Eben: May we look them over in the court room?

By the Court: Yes.

1204 By Mr. Downing: I think the record does not show rulings with respect to the other motions.

I think there are some motions pertaining to some of the count 1—

By Mr. Eben: Yes. As to Leopold Knoll I had argued insufficiency of the evidence, in advance of the argument—

By the Court: Oh, do you want to talk some more?

By Mr. Eben: No.

By the Court: About anything? What did you want to urge?

By Mr. Eben: I merely want to call your Honor's attention to the fact that there has been no ruling in connection with the argument I made for Leopold Knoll, as to the conspiracy.

By the Court: I think there is evidence to go to the jury as to each and all of the defendants. I have no doubt of it.

By Mr. Gerber: And may the record show, for Munio Knoll I have made a motion for judgment of acquittal, at this time?

By the Court: Yes.

By Mr. Gerber: And I wish to adopt the general grounds Mr. Eben has, to avoid repetition, and also urge the fact that in my opinion if any conspiracy has been shown, there have been three separate and distinct
1205 conspiracies, which would cause a misjoinder of causes in one count, and that would make the count of conspiracy in this indictment invalid; further, that the proof in the case as to Munio Knoll is just as consistent with his innocence as guilt.

Now, that all the evidence has been in, there has not been sufficient evidence in this case to connect him with a conspiracy on his own.

By the Court: That motion will be denied.

By Mr. Bartoline: Let the record show on behalf of Marcel Lutwak I make the same motion.

By Mr. Sokol: And a similar motion for Regina Treitler. I had assumed that motion had been made already.

By the Court: Those motions are overruled and denied.

By Mr. Sokol: Your Honor, if all that remains for us to do is to examine the instructions, might the court adjourn, for the defendants—

By the Court: You gentlemen have all heard those very same things. Look them over quickly. Let's get along. You gentlemen want to get—

By Mr. Sokol: We didn't want to go.

By the Court: You want to try some other lawsuit 1206 before you die. Look those over. You heard those dozens of times.

By Mr. Gerber: Do these include or treat with the ones we suggested?

By the Court: No. I will take up with you the suggestions of the Government, and with the Government the suggestions of the defendants, after you have looked those over.

By Mr. Gerber: All right.

By the Court: The jury can go for the day. Let them go, and come in at ten o'clock in the morning.

Have you been over the instructions I handed you?

By Mr. Gerber: Almost, Judge, but not quite.

By Mr. Downing: I have no objection to those, your Honor.

By Mr. Sokol: Somewhere in the instruction there is an inadvertent reference to Grace Klemtner as a defendant. I know that in the beginning in one of the instructions you said she was not, but later on she is referred to as a defendant. I am sure it was inadvertent on the part of the court.

By the Court: Well, I don't know about that.

"That one Bessie Osborne, Grace Klemtner and Marcel—"

1207 By Mr. Sokol: I don't mean that one. There is a reference later on. I saw it.

By Mr. Gerber: Your Honor, in speaking of Grace Klemtner, calls her a defendant in there.

By the Court: She was. She has been dismissed out.

"Grace Klemtner, alias Grace Klemtner Knoll, is not a defendant in this case and you are to consider count 1 as against the defendants Munio Knoll, alias Zygmunt Romankiewicz, Marcel Max Lutwak, Regina Treitler and Leopold Knoll only."

By Mr. Eben: Yes, but our point is—

By Mr. Sokol: Later on there is a statement made—

By Mr. Eben: I think the jury should not be permitted to know that she had been a defendant in the case.

By the Court: Oh, she was. What does it say? She was a defendant.

"is not a defendant in this case and you are to consider count 1 as against"

so and so only.

By Mr. Sokol: The jury might reasonably draw an inference from it that she had pleaded guilty. They would be searching for some reason why she was not sitting down here.

1208 By the Court: I don't think they will, after having seen and heard her.

I don't see anything wrong with it.

I tell them she is not a defendant in this case.

"and you are to consider count 1 as against the defendants so and so,"

naming the four of them, "only."

I can't take it out. She is in there. They are charged to have conspired with respect to her.

Let's take up the Government's. Which are the Government's?

By Mr. Downing: They are the ones numbered—

By the Court: No. 1 is:

"The essence of the offense of conspiracy is the unlawful combination, confederation, or agreement to commit an offense against the United States. To 'conspire' means to agree, to combine, to confederate."

By Mr. Downing: I withdraw it, in view of the fact that it is in the court's instructions.

By the Court: All right.

By Mr. Downing: I think instruction No. 2, in view of the other instructions that the court has in the suggested instructions, can also be withdrawn.

1209 By the Court: I will hand them back to you.

By Mr. Downing: The same way with instruction

3.

The same way with instruction 4.

By the Court: All right. I hand 3 and 4 back to you.

By Mr. Downing: The same way with 5.

By the Court: All right. I hand 5 back to you.

By Mr. Downing: The same way with 6.

By the Court: All right. I hand 6 back to you.

By Mr. Downing: No. 7 is not in there, but I believe it has been covered, and I am willing to go along with the instructions that the court has suggested. That is from another case. It is another way of saying the same thing, which I believe the court has.

By the Court: Do you withdraw No. 7?

By Mr. Downing: Yes, I withdraw No. 7.

By the Court: Very well.

By Mr. Downing: I believe 8 is in there. I don't recall exactly. If it is, I will withdraw it.

By the Court: I think it is.

By Mr. Eben: It is in there.

By Mr. Downing: Then I will withdraw that.

That is my recollection on 9.

By the Court: It is in.

1210 By Mr. Downing: No. 10 I am not sure of, whether that is in there or not.

By Mr. Gerber: I think it is.

By Mr. Sokol: It is covered.

By Mr. Gerber: I think your Honor covers 10 in another way.

By the Court: No. 10 is:

"If you find beyond a reasonable doubt that there was a conspiracy as described in the first count of this indictment and that any or all of the defendants joined that conspiracy with guilty knowledge that he was joining such a conspiracy or continued in the conspiracy after acquiring such guilty knowledge, and also find beyond a reasonable doubt that any of the overt acts described in the first count of the indictment took place either prior to or during said defendants connection with the conspiracy, then you must find those defendants guilty as charged in the first count of the indictment."

By Mr. Downing: That is in an instruction your Honor gave in the Sylvanus Johnson case.

By the Court: Is there any objection to Government's instruction 10?

1211 By Mr. Eben: Yes.

By the Court: What is the objection?

By Mr. Eben: The objection is, first, I think it is covered in much better fashion in what your Honor submitted to us, and it seems ambiguous in the sense that the jury from this instruction might find if any one of the defendants joined the conspiracy they are all guilty.

By the Court: That would be true. Didn't it say "if there was a conspiracy as described"?

I don't know. I think perhaps that is sufficiently covered by what I have already given you.

Do you insist upon this 10?

By Mr. Downing: Of course, if your Honor decides that it has been sufficiently covered it doesn't do us much good one way or the other if we insist. I am not going to persist in our argument. I submit it. I think it has not been covered, but I will leave that to your Honor's discretion.

Just not to clutter up the record, I will withdraw it if your Honor thinks—

By the Court: Well, let's see.

By Mr. Downing: It has been given by your Honor in the Sylvanus-Johnson case, which involved conspiracy.
1212 acy.

By the Court: In what case?

By Mr. Downing: The case of United States v. Arcadia Insurance Company and Sylvanus-Johnson. It was on trial a year ago this time.

By the Court: Has that case been argued in the Court of Appeals?

By Mr. Downing: No. They are writing the briefs now. I do not think that is any part of the points on appeal. I submit there is as much justification for that instruction here as there was there.

By the Court: I do not believe I will give that.

By Mr. Downing: All right. Then the Government will withdraw it, your Honor.

By the Court: All right.

How about No. 11?

By Mr. Downing: I believe that is in your group of instructions.

By the Court: Do you withdraw 11?

By Mr. Downing: Yes.

By the Court: How about 12?

By Mr. Downing: I believe that is in.

By the Court: I think that is in.

How about 13?

1213 By Mr. Downing: That is a standard instruction.

I believe that is in there too.

By the Court: That is in, I think.

By Mr. Downing: Yes.

By the Court: How about 14? Any objection to 14?

By Mr. Eben: No. No objection.

By the Court: I will give 14.

By Mr. Sokol: Just a moment. It occurs to me that unless 14 were combined with the instruction with respect to proving intent beyond a reasonable doubt, that the jury might infer from No. 14 that they could presume intent when in fact that must be an essential element of the case which the Government has to prove, and it occurs to me that is objectionable from that viewpoint. It would throw off, actually, a responsibility.

By the Court: Oh no, I don't think so. I think 14 is satisfactory. I will give 14.

What about 15?

By Mr. Downing: Are you directing that to—

By the Court: To the defense.

By Mr. Eben: It does not seem to add anything to the instructions one way or the other. We have an instruction there on circumstantial evidence which covers the matter much more adequately than this brief three-line 1214 instruction.

By the Court: Well, I will give that unless I find something better.

How about No. 16?

By Mr. Eben: I object to this one.

By Mr. Sokol: That is not appropriate.

By Mr. Eben: It seems to me that this instruction represents an effort on the part of the Government to move away from vouching for the credibility of witnesses that are put on the stand.

By the Court: I won't give 16.

By Mr. Eben: I think you already have 17 in your instructions, your Honor.

By Mr. Downing: I am not sure it is in that language.

By Mr. Downing: And there are further parts of it that are wrong.

For instance, "the law permits the defendants to testify on their own behalf."

By Mr. Downing: Because of the status of the thing, it should be modified.

By the Court: I think it is sufficiently in there.

How about 18?

By Mr. Eben: I believe you have covered that.

By the Court: I think it is covered.

1215 By Mr. Eben: You have an instruction on demeanor, and so on.

By Mr. Downing: I will withdraw it.

By the Court: All right.

By Mr. Downing: 19 I withdraw. It has no applicability.

By the Court: You don't want 20 in, do you? Or do you?

By Mr. Gerber: No. That is objected to.

By Mr. Downing: I think where people are alleged to have had certain marriages under the circumstances of this case, some definition—

By Mr. Bartoline: We have a definition in there.

By Mr. Downing: I submit this is more appropriate and well founded.

By the Court: I think I will give that.

By Mr. Gerber: It is objected to on the part of Munio Knoll.

By the Court: What is wrong with it?

By Mr. Gerber: I think it is wrong because they undertake to give a definition of marriage which I think is misleading and which is not proper. They say:

"'Marriage' may be defined as the civil status of one man and one woman, capable of contracting, 1216 united by contract and mutual consent for life,"

carrying with it the inference that if people are divorced—

By the Court: You are not going to introduce terms of years in the marital relation, are you?

By Mr. Gerber: They shouldn't either. They say "for life". I think it should be silent.

By the Court: No.

By Mr. Eben: I have the same objection, and there are many other incidents to the marriage relationship which are important in determining whether there is a valid marriage, which are covered in our instruction. I think our instruction covers the whole subject matter in its entirety, and in better fashion than this instruction, and is clearer.

By Mr. Sokol: Probably your Honor will reserve decision on this until you have reviewed ours. We feel ours is more adequate than that presented by the Government.

By Mr. Downing: Naturally, I differ with counsel.

By Mr. Sokol: We assume that.

By Mr. Bartoline: Let the record show that Marcel Lutwak is also objecting.

By Mr. Downing: This is based on the law as set forth in 55 Corpus Juris Secundum, 806.

By Mr. Eben: Yes, but it does not set out all the law that is set out there.

By Mr. Downing: There are other instructions which do set out all the pertinent parts.

By the Court: I will give it unless I am presented with a better one.

What about 21?

By Mr. Eben: I find that objectionable, particularly in the last part of the last sentence. I point to the words:

“to thereafter reside in the United States as man and wife.”

The law does not go that far. Anyone who entered the United States under the War Brides Act, who later got a divorce, even though validly married—

By the Court: I think there had to be an intent to live together until death did them part. They might later have changed their minds.

By Mr. Eben: They had to have the intent when they came in here, your Honor.

By Mr. Sokol: If there were added to this some sentence with respect to intent then of course I believe it could be cured.

By Mr. Gerber: It does not say, “intent,” in the 1218 instruction, Judge.

By Mr. Downing: The point I am making is that—

By the Court: I think that is good. I think I will give that. I will give No. 21.

How about No. 22?

By Mr. Gerber: I object, on behalf of Munio Knoll.

By Mr. Bartoline: I object on behalf of Marcel Lutwak.

By Mr. Sokol: Do we have to keep making objections, if we make a request, if we are asking the court to give another instruction?

By the Court: Most assuredly you do. You are making your record now.

By Mr. Sokol: Very well. I will record an objection for Regina Treitler.

By Mr. Eben: We object to No. 22, if your Honor is up to the point.

By the Court: I am going to stop. We will stop with 21. Take up 22 in the morning.

By Mr. Eben: All right.

By Mr. Downing: Although it may be inappropriate now, I want to mention the Government appreciates the courteous way in which your Honor listened to our side of the argument. I think that we have received very courteous treatment from the court in that respect.

By the Court: I don't know whether you have or not.

By Mr. Downing: I may not agree with you, but I appreciate the opportunity of presenting our side of it.

(Thereupon the further trial of the above-entitled case was adjourned until 10 o'clock a. m. of the following day, January 17, 1951.)

1220

• • (Caption—No. 50 CR 464) • • •

Chicago, Illinois
January 17, 1951,
10:00 o'clock a. m.

Met pursuant to adjournment.

Present:

Mr Downing

Mr. Owen

Mr. Gerber

Mr. Bartoline

Mr. Sokol

Mr. Eben

Mr. Watt

Mr. Weissbourd

And thereupon the following further proceedings were had herein, out of the presence and hearing of the jury:—

By Mr. Downing: Your Honor, there are two or three things I would like to clear up for the record here.

First of all, the defendants have not rested, as far as the record is concerned. There has been an informal observation by Mr. Eben that they were going to rest, but formally there has been no defendants resting. I would like 1221 to have that in the record before he go on with our instructions.

By Mr. Eben: We rest.

By Mr. Sokol: We rest.

By Mr. Bartoline: We rest.

By Mr. Owen: We rest.

By the Court: Each of the defendants rest.

The Defendants Here Rested Their Case.

By Mr. Downing: As to this matter we were discussing yesterday afternoon and yesterday morning, there is a matter involved in this thing that, just for our own purpose, we are respectfully asking the court about.

You indicated—I am reading from page 1144:

“I do not think, therefore, that the statute which we have considered may permit or properly permit prosecution in this Northern District of Illinois of offenses that were committed in the State of New York or in the Southern District of New York or in the Eastern District of New York.”

There was not any ruling, of course, that the statute was unconstitutional, that is, 164. I do not know what the court's intention was, whether merely to say the statute did not apply here—

1222 By the Court: I don't think the statute, if it were construed to permit the prosecution in this district of offenses such as are set forth in counts 2 to 6, would be constitutional.

But I think it can be construed so as to be constitutional, if it be held to be applicable only to continuing offenses. Then I think it would be valid.

By Mr. Downing: I think that clarifies your thinking then, your Honor, because there was not any wording in there about the distinction. I think that will clarify the record.

As to the type of order, may we suggest, your Honor, that inasmuch as the defendants have made motions for

acquittal as to counts 2, 3, 4, 5 and 6, your Honor deny such motions and that you then dismiss counts 2, 3, 4, 5 and 6 as to each of the defendants mentioned in the respective counts?

I would like to have the record show that you deny their motions for acquittal and then dismiss the counts 2, 3, 4, 5 and 6, for the reasons that you have stated yesterday as to each of the defendants.

By Mr. Eben: I think I ought to have an objection to that, if your Honor would like to hear from us on it.
1223 I think that your Honor's solution of how this matter should be handled yesterday, in which, if I understand the record correctly, you said you would enter an order dismissing counts 2, 3, 4, 5 and 6, on the basis of lack of proper venue, is probably the only type of order that your Honor would want to enter under the circumstances.

By the Court: Well, I said I didn't want to enter a judgment of acquittal on those counts, and that I thought there ought to be an order dismissing for want of proper venue.

Now the Government says: "Well, you ought to deny the motions for acquittal." Well, I suppose I should.

I am not acquitting them. I don't think the question being raised as to proper venue—I think the venue was improper, and that is all I am holding. So I guess I should deny the motions for acquittal. I will deny the motions for acquittal as to each of the defendants.

By Mr. Downing: On counts 2 through 6.

By the Court: On counts 2 through 6. I have already denied it as to count 1.

By Mr. Downing: That is right, your Honor.

And then you enter an order dismissing counts 2
1224 through 6 for lack of proper venue, is that correct?

By the Court: Yes.

I have been looking over these instructions which I handed to you, and I think because of the dismissal of counts 2 through 6 I should insert this, just before I begin with the discussion of count 1:

"The indictment in this case contains six counts. The court has dismissed all of the counts other than the first count. You are completely to disregard counts 2 to 6, inclusive, of the indictment except as

those counts are by the wording of count 1 made a part of count 1."

No, I told you about that. Let's see. There was something else. This is it.

I think this is it. I called your attention to this yesterday, but here is an insert I want to make. It is between (d) and (e).

Then there is a reference in that first count to the other counts. Count 1 stands, and so I think I should put this in:

"The offenses against the United States which it is alleged the defendants conspired to commit, that is, the offenses set forth in counts 2 to 6, inclusive, 225 of the indictment, are, briefly stated, the offenses of obtaining entry into the United States as an alien immigrant by means of false statements and by concealing material facts, and aiding and abetting so to do, and making false statements under oath in applications required by the immigration laws of the United States."

I think that is a correct short statement of what is charged in those counts 2 to 6, and I will insert that, Gentlemen.

By Mr. Downing: I think it is a proper statement, your Honor.

By Mr. Eben: In connection with that, your Honor, we take the position and will at the proper time, we do not think this indictment ought go to the jury, and for several reasons, one of which we referred to yesterday, and that was because of the—

By the Court: Oh, I act upon the assumption that jurors are reasonable folks, and I am going to continue to act on that assumption as long as I am on this bench, and I am going to tell them as clearly as I can that they are to disregard counts 2 to 6, and tell them the indictment in this case contains six counts and the court has dismissed all of the counts other than the first count, and tell them:

1226 "You are completely to disregard counts 2 to 6, inclusive, of the indictment except as those counts are by the wording of count 1 made a part of count 1."

By Mr. Eben: I think in that event your Honor would probably have to define the essential elements of counts 2 to 6.

By the Court: I have read to you what I propose to tell them. The offenses are obtaining entry into the United States as an alien immigrant by means of false statements, by concealing material facts, and aiding and abetting so to do, and making false statements under oath in applications required by the immigration laws of the United States.

If you want any further elaboration of the charges in counts 2 to 6 you just hand them to me.

By Mr. Eben: I follow your Honor.

By the Court: Let's proceed.

By Mr. Eben: We were up to 21.

By Mr. Downing: I believe we were next considering Government's instruction No. 22.

By Mr. Gerber: That is right.

By Mr. Eben: Yes. To which we have an objection.

By the Court: Let me see.

I said I would give 14, 15, 20 and 21.

1227 By Mr. Gerber: Right.

17. By the Court: And I said I would refuse 16 and

By Mr. Downing: That is right, your Honor.

By the Court: Now we are going to consider 22. Do you have 22, gentlemen?

By Mr. Gerber: Yes, we have.

By the Court: Any objection?

By Mr. Gerber: Yes, we object.

By Mr. Eben: Objection is based, first, on the ground there is no evidence in the record upon which to base such instruction in view of the District Attorney's admission in his opening statement there has been a Rabbinical divorce between Maria and Munio Knoll and, secondly, it is contrary to the law, which is that where a second marriage is shown, it is presumed to be valid unless shown otherwise, and the first marriage is held to be dissolved under such a presumption, without some proof on the part of the Government. Therefore the instruction—

By the Court: You know, I held contrary to that here very recently, and the Court of Appeals affirmed me.

By Mr. Watt: Earlier in the case—

By the Court: And that was in a war risk insurance case.

1228 By Mr. Downing: That is right.

By Mr. Watt: We had two Illinois decisions in court, which we could very easily obtain, which hold very clearly that where two marriages are shown, the second marriage is presumed valid—

By the Court: I acted on the contrary theory and the Court of Appeals affirmed me, and I certainly didn't want to act on that theory in that case. But I had to, as I thought.

By Mr. Eben: There is also the point, and I again state it, so that I am sure your Honor will have it in front of you, that the District Attorney did in his opening statement—

By the Court: I know he stated there had been a Rabbinical divorce, but I don't know what that means.

By Mr. Eben: Well, the burden is on them to show such a divorce is ineffective.

By the Court: No. I think the jury will have to determine what the situation is.

By Mr. Gerber: On the question of law, may I state in fairness to the case, that when that was going on I made it my business to check with the President of the Jewish Theological College here, that trains Rabbis for the Rabbinate, and I asked them about it, and they

1229 checked with certain Rabbis who had been in Poland in 1932 and before; and came in as refugees, and they told me, Judge, that under the laws of Poland a Rabbinical marriage could be performed and it could be valid, and a Rabbinical divorce could be valid under the country.

By the Court: That is not—

By Mr. Gerber: It is not in the record, but I am just saying this, for this purpose, we are left in the dark, and it may very well be that under the laws of this country this divorce is a valid one, and for that reason this instruction would not be right.

By the Court: I will give this instruction. I think it is right.

By Mr. Gerber: Exception.

By Mr. Eben: I object.

By Mr. Sokol: Objection.

By Mr. Bartoline: Objection.

By Mr. Eben: Let the record show an objection on behalf of all defendants.

By the Court: Yes.

By Mr. Eben: That brings us to 23, your Honor, to which we also object.

By Mr. Downing: This is from the Rubenstein case.

By the Court: Well, I think I will give 23. I 1230 think that is all right.

By Mr. Eben: May I state my objection, your Honor?

By the Court: Yes.

By Mr. Eben: This instruction is faulty even though as counsel says, it probably purports to be given under the Rubenstein case, because the Rubenstein case went a little further than what this instruction purports to do.

This instruction is not, in my opinion a good instruction, because, first, it does not consider the question as to a marriage where one assents to the marriage and the other does not. In such event, the marriage is merely voidable and not void, and I believe your Honor should instruct the jury on that.

Our instruction does carry such a provision.

Secondly, the instruction does not consider the question as to whether or not the parties need intend to forthwith assume all the duties and responsibilities of marriage, and the law seems very clear, that a marriage is valid even though they do not intend immediately to assume all such duties and responsibilities.

Thirdly, the instruction is a poor one, in my opinion, because it does not consider the question as to the validity of marriage even though it is immediately repudiated 1231 and the law is also clear that a valid marriage may be entered into and immediately repudiated. Nevertheless, the marriage itself is valid.

Finally, it fails to bring to the attention of the jury the fact that a marriage which is entered into for an ulterior motive or for material gain might still be a valid marriage, if the other prerequisites are present.

I say the instruction is faulty on all four of those counts, and I object to it on behalf of all defendants.

By the Court: I think this correctly states the law. If there is any other law that ought to be given you can call my attention to it. I will give 23.

1232 By the Court: No. 24:

"In order to constitute a valid marriage, the essentials common to all contracts, capacity and consent must be present. In this connection, mere words without any corresponding intention will not create the marriage relation, and that notwithstanding though formalities indicating consent"—

By Mr. Downing: I think that word "though" should be taken out. I think the word "though" is redundant in there, and I think it should be out of there.

By Mr. Eben: It seems to be somewhat repetitious of matters they have in instruction 23. In any event, it is subject to the same objections stated in connection with instruction 23.

Mr. Downing: I think that the word "though" can be eliminated from the fifth line.

By the Court: This punctuation does not seem to be right, either.

By Mr. Downing: I think in the first sentence the punctuation is all right. In the second sentence, if we eliminate the word "though", in that fifth line.

—"notwithstanding the formalities indicating consent have been complied with there is no valid

1233 marriage where the parties do not intend to enter into the marriage relation."

I think that is what caused the problem. I mean, it was a problem when I first looked at it.

By the Court: How about the word "that", in the fourth line?

By Mr. Downing: That could be eliminated, right before the word "notwithstanding".—"notwithstanding the formalities indicating consent have been complied with." Those two words can be eliminated, and make it, I think, clear.

By the Court:—"notwithstanding the formalities indicating consent have been complied with, there is no valid marriage where the parties do not intend to enter into the marriage relation."

I will give it in that form, striking out the words "that" and "though". That is No. 24.

By Mr. Eben: Objection on behalf of all defendants.

By Mr. Downing: 25 should be withdrawn, your Honor.

By the Court: Very well. Any objection to No. 26?

By Mr. Eben: Yes, there is, your Honor. It seems to me the language in the fourth line of that instruction is objectionable in that it calls the jury's attention only to the task as being directed towards finding the defendant guilty. As I understand it, they also have a task to determine whether they are guilty or innocent, and I would suggest if your Honor does give the instruction, that those words be included at that particular point. It should be their only task, is to determine whether they or any of them are guilty or innocent as charged.

The same objection would go to the next to the last line starting "It bears on the question of guilt of the defendant." I think the words "or innocent" should be included there.

Thirdly, the third sentence starting, "You have no concern with the guilt of any person or persons not named in the indictment, and not defendants in the trial", seems to be objectionable because on the basis, if your Honor sends the indictment to the jury, on the basis of this instruction which you prepared and showed to us yesterday, Grace Klemtner is shown with other defendants, and is named as a defendant in the indictment still, and it is quite possible that the jury will go off and start conjecturing as to her guilt.

By the Court: That is why I am telling them not to pay any attention to that.

By Mr. Eben: That same objection to the last part of which I just stated also appears three lines later, 1235 which starts "or guilt of any person or persons not named in the indictment."

By the Court: "Or not on trial before you." I think that word "and" ought to be "or".

By Mr. Downing: Yes, it should be.

By the Court: I think, modified in this respect, the instruction would be all right:

"The sole question before you is whether the defendants named in the indictment are guilty as charged.

"Your only task is to determine whether they or any of them are guilty, or not guilty," inserted. "You have no concern with the guilt of any persons not named in the indictment and not before you"—

I think that ought to be "or".

—“or any defendants in the trial which has just drawn to a close in the evidence or any circumstances surrounding the presentation pointing to the guilt of any person or persons not named in the indictment or not on trial before you. You are in no sense to consider such evidence or such circumstances except that
1236 it bears upon the question of the guilt or innocence of the defendants or some of them.”

I think I will give it, as modified.

1237 I will have it recopied.

By Mr. Eben: While your Honor is having that done, I would like to clarify our objection on the record, which I make on behalf of all of the defendants, to allowing the jury in any way to consider that Grace Klemtner is a defendant in this case, or allowing the indictment to go to the jury with any mention of her as a defendant in the case because, as your Honor knows, she is not a defendant. She has been dismissed out, and I fear that the jury may, in looking at the indictment, draw some inferences from the fact that she is so named, and I do not think they should be permitted to do so.

By the Court: No, no.

By Mr. Eben: My suggestion is, may it please the Court, that the indictment, if it goes to the jury, that her name should be deleted.

By the Court: No, no. I won't do that. I am not going to modify the indictment. I have dismissed her out of the case; and I dismissed counts 2 to 6, rightfully, I think, but I am not going to mutilate the indictment. And I want to continue to think that jury men and women are rational human beings. If anybody else wants to consider them otherwise, that is just their responsibility. If you feel they are not rational, I cannot help it. I think they are.

1238 By Mr. Eben: It is because that I feel they are rational human beings that I think they will say that Grace Klemtner is still a defendant in this case.

By the Court: I will tell them that she is not. The instructions are going to the jury.

Now then, I am giving 14, 15, 20, 21, 22, 23, and 24. There is one other. What is that number?

By Mr. Downing: 26, your Honor.

By the Court: That the Government submitted.

Now then let us take up the defendants, No. A. Any objection to A?

By Mr. Downing: I think it is covered in your instructions already, your Honor. I do not see any sense in repeating it.

By the Court: I think I will give A.

By Mr. Downing: I think B is already given.

By the Court: I will give it so that there won't be any doubt about it.

By Mr. Downing: I certainly object to No. C.

By the Court: Oh, I will give C.

How about D?

By Mr. Eben: Excuse me, your Honor. In connection with C, there seems to be one error in the last sentence. The last word, I think, to make good grammar, should read "himself".

1239 By the Court: Shall I change it with a pen?

By Mr. Eben: Oh, certainly, by all means.

By Mr. Sokol: Excuse me. If you are going to change "himself", you must this—

By the Court: With himself. I will give it as modified.

By Mr. Downing: As to No. D, your Honor, this one has been covered as a general instruction, and I do not see any reason to repeat it.

By the Court: I think I have fully covered that. Don't you think I have?

By Mr. Downing: It is fully covered in your standard instruction.

By the Court: Don't you think that I have covered it?

By Mr. Sokol: I think so. I don't think Mr. Eben heard you.

By the Court: Don't you think that I have covered that?

By Mr. Eben: Yes, sir, I think that you have covered it. We will withdraw it.

By the Court: How about E?

By Mr. Downing: I think that has been covered.

By Mr. Sokol: That is withdrawn.

By the Court: How about F?

1240 By Mr. Downing: I think that too is covered, your Honor.

By Mr. Eben: Yes, it has been covered.

By the Court: You are withdrawing F. How about G?

By Mr. Downing: I think that that is covered.

By Mr. Eben: No, I would say it is not.

By Mr. Sokol: No, that has not been covered.

By Mr. Downing: Well, I object to the wording here, I mean the law as to reasonable doubt.

By the Court: No, I do not see any harm in it. I will give G.

By Mr. Downing: H, you have an instruction as to reasonable doubt.

By Mr. Sokol: We will withdraw that.

By the Court: H is withdrawn. How about I?

By Mr. Eben: There is nothing in your instruction about that. This had to do with reading of newspapers and so on.

By the Court: I think I will give I.

By Mr. Downing: May I make this observation?

By the Court: Yes.

By Mr. Downing: With respect to the last two sentences, beginning especially after the words "United 1241 States", I question the propriety, on the face of the instruction—up to that point, I have no particular quarrel with the instruction, but I do not see any sense in the terminology thereafter used, except for the last sentence.

By the Court: Oh, well, I don't know.

By Mr. Downing: I don't have any objection to the last sentence.

By Mr. Eben: Government counsel is contending that he must be considered in a different light.

By the Court: No, I think it is all right.

By Mr. Eben: This is not covered. I am now referring to the requested instruction J. It is not covered in your Honor's instruction.

By Mr. Downing: Well, parts of its have been covered. I think they have got included in here one sentence. There may be some merit to his statement; but I think in substance—

By the Court: I think I will give that. I think it is covered but I will give it.

K?

By Mr. Eben: That has to do with intent?

By Mr. Downing: Well, there again, I think that this is covered in your instruction.

By the Court: Oh, I think I will give K.

1242 By Mr. Downing: It is specifically objected to. I do not see any propriety in singling out any one individual and tendering a separate instruction.

1243 By Mr. Sokol: The reason was tendered, Regina Treitler is not a party to any marriage, and I insist upon an instruction, not naming Regina Treitler specifically, but I think if the Court is going to give an instruction with respect to the parties to a marriage—

By the Court: I do not want to pick out a defendant like that.

By Mr. Sokol: I am not suggesting that she be named, but I think it is important to distinguish between parties. You are going to give an instruction with respect to the parties to a marriage, and she is not a party to a marriage.

By the Court: I will give the first lines of it, if you want that much of it. I won't give the remainder of it.

By Mr. Downing: I have no objection to the first five lines, but the balance of it, I still think is objectionable.

By the Court: No, I am not going to pick out any of the defendants.

By Mr. Sokol: Let me ask this of your Honor. The defendant Treitler has a right to have her guilt or innocence determined, as to her intent.

By the Court: Well, there is no use spending all
1244 the rest of the court year in this case. I will give the first five lines. I won't give the other five. If you want the first give you may have them.

By Mr. Sokol: The first five are already covered by the Court.

By the Court: You don't want them?

By Mr. Sokol: No, I want the last part.

By the Court: The record may show I am willing to give the first five lines. You object to the last five?

By Mr. Downing: The Government objects to the last five, your Honor.

By the Court: Very well. I will refuse them.

By Mr. Eben: The next instruction has to do with piling presumptions on presumptions.

By Mr. Downing: I think, in effect, that has been covered.

By the Court: What is that?

By Mr. Downing: M.

By Mr. Eben: We will withdraw that.

By the Court: You are withdrawing M?

By Mr. Eben: Yes, sir.

By Mr. Downing: The Government objects to instruction N.

By Mr. Eben: That is not covered in any instruction, 1245 guilt by association.

By Mr. Downing: I think it is covered in the conspiracy instruction which the Court has already indicated he will give. I do not think that this will—

By Mr. Eben: Mere association without something else does not make a party guilty of a conspiracy.

By Mr. Sokol: I believe the Deray case—there is a case that has exclusively passed on that.

By the Court: I will give N.

By Mr. Eben: Your Honor has an instruction on this one?

By the Court: Which one, O?

By Mr. Eben: On O. You asked us if we wanted the last instruction given. If I may have just a second with my associates to determine that, we will inform your Honor.

We would like to have ours on that.

By Mr. Downing: I think the Court's instruction is better.

By Mr. Eben: We would like to have instruction O given, your Honor.

By Mr. Downing: I think the one the Court has is a standard instruction. It has been used around here for a long time, and it has been approved.

1246 By the Court: I think what I say is sufficient. I will refuse O as covered.

By Mr. Downing: The Government submits, with respect to P, that this is covered in the Court's instruction.

By Mr. Eben: I don't think it is, your Honor. There is no mention of circumstantial evidence at all.

By Mr. Downing: That is my recollection. I may be hazy on it.

By the Court: No, I do not think there is anything about circumstantial evidence.

By Mr. Downing: Well, apparently I was thinking of some other case. I think that this instruction of the Court, the standard instruction which you have given numerous times on circumstantial evidence, I think more clearly states the proposition than does this instruction.

By Mr. Eben: This happens to be Judge Medina's instruction, copied verbatim, given in the communist case in New York.

By Mr. Downing: Judge Barnes has given an instruction on this for a long time, and I submit it is a better type of instruction.

By the Court: Well, he mixes up circumstantial evidence with—

1247 By Mr. Downing: I do not think this is as clear as the instruction you normally give. I did not submit one because I think your standard instruction usually covered it.

By the Court: Can you find the instruction on circumstantial evidence which I ordinarily give, please? We will put P aside for a moment.

1248 By Mr. Eben: Instruction lettered Q is our instruction on marriage.

By Mr. Downing: I submit it has already been covered by the other instruction.

By Mr. Eben: The only trouble with the Government instruction is that it is blanket which only comes up to the knees, and in this case it should come up to the chin. We allude in our instruction to many matters—

By the Court: I think it ought to come up over the head.

By Mr. Gerber: That is right, Judge; it should.

By Mr. Downing: I think the Government's instruction covers the head as well as the knees.

By Mr. Gerber: Not quite.

By the Court: Here was an instruction given in a case which has been about as thoroughly reviewed as any case has ever been in my knowledge:

"There are two kinds of evidence, direct and circumstantial. Direct evidence is that sort of evidence by which a fact is proved directly and without inference from other facts, and is usually given by witnesses who saw, hear or otherwise observed some particular fact or occurrence. Circumstantial evidence is that sort of evidence by which an inference of an unknown fact is drawn from the existence of known facts. For example, if when you went to bed at night you saw the ground was bare of snow, and in the morning when you awakened you saw the ground covered with snow, while you had

not seen the snow fall nevertheless you can infer from the evidence you see that it snowed during the night. That is an illustration of what circumstantial evidence is.

"Circumstantial evidence in criminal cases is the proof of such facts and circumstances connected with or surrounding the commission of the crime charged as tend to show the guilt or innocence of the party charged. If the facts and circumstances shown by the evidence in this case are sufficient to convince the jury of the guilt of the defendants or any of them beyond a reasonable doubt then such evidence is sufficient to authorize the jury to find the defendant or defendants guilty. The law demands a conviction where there is sufficient legal evidence to show a defendant's guilt beyond a reasonable doubt, and circumstantial evidence is legal evidence."

1250 By Mr. Downing: If your Honor please—

By the Court: Somehow or other, I think that is a clearer instruction than Judge Medina's.

By Mr. Downing: It has been approved also by this Circuit.

By the Court: It has been approved by the Supreme Court expressly.

By Mr. Eben: It strikes me, however, that the balance in any event should be given and that is, since from circumstantial evidence you draw inferences, the jury should be told that if the inference they draw is as consistent with the theory of innocence as with guilt they should adopt the former.

By the Court: That is a different question. That is not circumstantial evidence.

"The guilt of an accused is not to be inferred because the facts proven are consistent with his guilt, but on the contrary before there can be a verdict of guilty you must believe from all the evidence and beyond a reasonable doubt that the facts proved are inconsistent with his innocence. If two conclusions can reasonably be drawn from the evidence, one with innocence and one with guilt, you should adopt the former."

1251 That is one proposition of law. Circumstantial evidence is an altogether different thing.

By Mr. Eben: That would cover both circumstantial and direct.

By the Court: I think I will give the instruction on circumstantial evidence which I have just read to you.

I will refuse P because it is all covered.

What do you say about Q?

By Mr. Downing: The Government submits that Q is covered by Government's instructions 20, 22, 23 and 24. Certain provisions of this thing are contrary to the law in the Rubenstein case, which is the basis of Government's instruction 23. It is a conglomeration of different aspects, and I think it has all been covered.

Using counsel's analogy, I think it is covered from head to toe in the four Government instructions which the court indicated its intent to give.

By Mr. Eben: Virtually everything, your Honor, starting from about the second paragraph on is not covered by the Government's instruction.

By the Court: I have a little doubt about one or two parts of it. However, I think I will give it.

1252 By Mr. Downing: In addition to what--

By the Court? Yes.

By Mr. Downing: All right.

By the Court: What is this, Q?

By Mr. Downing: Yes, that is Q.

By the Court: What about R?

By Mr. Downing: I think that has been covered in Government's instruction 12, which I withdrew because it had already been covered in the court's instructions.

By Mr. Eben: If it is covered in the court's instructions there is no disposition on our part to state it in different language.

By Mr. Sokol: No. 12 is not covered. While it is suggested, it does not indicate to the jury that the basis upon which they would disregard such testimony--

By Mr. Downing: I did not mean to infer that Government's instruction 12 was given. I said one like it was given in the court's instructions.

By Mr. Sokol: If the court's instruction cover the question of disregarding the testimony and the question of innocence depending upon such testimony, we would withdraw it. But if it doesn't, then we would want R.

By the Court: I think that goes farther than the law permits.

1253 By Mr. Sokol: I took it from some of the instructions Judge Woodward used to give.

By the Court: Yes. He was a good lawyer, but everything he did wasn't right. Maybe counsel misled him.

By Mr. Sokol: I merely want to indicate to the court it was not in vengeance.

By the Court: Well, I think if I were in your place I would disclaim authorship of that. I don't think it is a good instruction.

By Mr. Sokol: It is tendered because of the fact that there were two witnesses each of whom testified with respect to business transactions with one and not other of the defendants.

By the Court: If you tender an instruction that if any witness or witnesses showed bias by their demeanor or testimony on the stand and showed bias or prejudice against one or more of the defendants, that fact, if it be a fact, may be taken into consideration in determining the truth or falsity of what the witness said—I would give it. But you mix it all up.

If you bring me such an instruction as I have indicated, I will give it to you.

By Mr. Sokol: I believe the next one partly covers that, S.

1254 By Mr. Downing: I submit S is in your standard instruction. Of course, there is no basis for this instruction. This instruction is without any foundation.

1255 By the Court: What basis is there for "has received or hopes to receive"?

By Mr. Sokol: The fact that there was testimony by a woman who is an admitted accomplice by her testimony—she makes certain assertions and you have her participation, about which she has testified. It is a serious question as to whether or not the fact that she was—the Court calls attention to the fact that some people are not named in the indictment. There is a serious question as to whether or not that should not be considered.

By Mr. Downing: That would be covered in the type of instruction your Honor suggested to counsel. But this type of instruction, I think, has no basic foundation in fact, or otherwise.

By the Court: "You are the sole judges of the credibility and weight to be given to the testimony of witnesses who have testified in this trial. In weighing the

testimony of each witness, you should carefully scrutinize the same, consider all the circumstances under which the witness testified, his demeanor on the stand, the relation which he bears to the Government or the defendant, the manner in which he might be affected by the verdict, 1256 the extent to which he is corroborated or contradicted by other credible evidence, in short, any circumstance that tends to throw light upon his credibility. Applying these tests which I have stated, it is for you to determine the weight which is to be given the testimony of each witness."

By Mr. Downing: That covers this situation.

By Mr. Gerber: No, it does not.

By Mr. Sokol: It does not go that far.

By Mr. Downing: There is no basis for going farther.

By Mr. Sokol: I submit that the presence of the witness Bess Osborne on the stand does. You differ.

By the Court: What does this mean?

"Weighing and considering his credibility, the credibility of the witness, the jury should consider whether any witness has been interested."

What does "interested" mean?

"Has received or hopes to receive any reward, immunity or benefit from the prosecution of the case."

I can see that. But "interested"—

By Mr. Gerber: We can take out the "interested". You have covered that.

By Mr. Sokol: If you strike out the word "interested", I don't have any—

By the Court:—"or in any other manner become interested". Interested in what?

By Mr. Downing: There it comes back again.

By the Court:—"or has had his feelings or passions enlisted against the defendant."

There is no evidence of that.

By Mr. Downing: That is right.

By Mr. Sokol: I think the witness Ludmer is a good indication of that.

By Mr. Gerber: There can be an inference of that by the jury, your Honor.

By Mr. Downing: The next wording, "If the jury should find such witness has sustained or does sustain such relation"—I don't think the jury would know what that wording means.

By the Court: If you have a copy of that, I will see if I can modify it. Have you a copy you can hand me?

By Mr. Sokol: Yes. Do you want it?

By the Court: Yes.

—“in weighing and considering the credibility of the witness, the jury should consider whether the”—
1258 —“has received or hopes to receive any reward, immunity, or benefit”—

—“reward or immunity or benefit from the prosecution of the case.”

By Mr. Downing: There is no basis for the use of the word “benefit”, your Honor.

By Mr. Sokol: I think there could be. The personal gratification of a malicious person, that such a person might find in seeing people found guilty, does I think, warrant the presence in that instruction of that word.

By Mr. Downing: But the jurors will wonder what the use of the word “benefit” there means.

By Mr. Gerber: “Reward” is synonymous with it.

By Mr. Downing: Then strike out the word “benefit”.

By the Court: —“has received any reward or immunity or benefit from the prosecution of the case, or has in any other way become interested.”

That is just getting way out in thin air. I don't know what it means.

—“or has had his or her feelings or passions enlisted against the defendants or any of them.”

—“and if the jury should find any such witness has
1259 sustained or does sustain such relation to the case as would naturally tend to interest him”—

That I just cannot see.

By Mr. Sokol: I did not draw that. It would be agreeable to me to strike the word “naturally”.

By the Court: This is a job to try to fix this up.

By Mr. Sokol: I think if the Court struck the word “naturally”, the rest would be all right.

By the Court: —“interest him or her.” Mere interest in the case does not disqualify them.

I will refuse that unless you can fix it up. I cannot fix it up.

By Mr. Sokol: I did not draw it, if your Honor please, but I would like to fix it up and I would like the Court to give it in some way.

By the Court: If you want to rewrite R and S, I will consider them. But I will refuse them unless you make some modification in them.

T: "Certain statements allegedly made by the defendants in this case have been received in evidence and read to you in whole or in part. You are instructed that you are not to consider in your deliberations that these statements were made in furtherance of the alleged conspiracy 1260 charged in the indictment. They are, therefore, not to be considered by you as proof of participation of any defendant in any alleged conspiracy other than the defendant who allegedly gave the statement.

I think this would be proper.

"Certain statements allegedly made by the defendants in this case have been received in evidence and read to you in whole or in part. You are instructed that said statements have been received only against the persons who made them and are not to be considered by you as proof of the participation in the conspiracy of any defendant other than the defendant who made the statement."

I think that would be all right.

By Mr. Downing: I have no objection to that.

By Mr. Gerber: I agree that is a proper statement.

By the Court: I will modify that statement, and, as so modified, give it.

"U".

By Mr. Downing: As to the first part, I submit you have already instructed them in your general instructions 1261 concerning the law about this matter.

As to the second part of it, you are, I think, telling the jury what is a question of fact. It is up to them to decide on the facts. It is a question of evidence about whether they were honorably discharged.

By the Court: I think that is an undisputed fact. I think that is all right. I will give U.

1262 By Mr. Downing: This again singles out—

By the Court: I will refuse V.

By Mr. Eben: That seems to be a duplicate, doesn't it?

By the Court: I will refuse V. I will refuse W.

By Mr. Gerber: May I be heard on that for a moment?

By the Court: Go ahead.

By Mr. Gerber: There is evidence that has been developed, your Honor, that at the time Munio Knoll signed his

statement for application for admission he could neither read, write nor understand English. The immigration inspector who officiated was not here, and I could not examine him as to whether he read it to him. Bess did not recall whether it was read to him or not before he signed it.

By the Court: Well, I will refuse it.

By Mr. Downing: As to the next one, of course, there was one witness called by the court which of course I did not submit an instruction on. But if the court considers this instruction I submit something should be incorporated therein about one of the witnesses being a court's witness.

By Mr. Eben: The instruction says:

"The Government by calling witnesses—"

1263 The court's witness was called by the court and not by the Government.

By Mr. Downing: But does the jury know that? It is a subtle way of trying to imply merely Grace Klemtner was put on as part of the Government's case, that thereby she is a government witness.

By the Court: I will give this but, in view of Mr. Downing's objection, if I give it, I will say:

"All of the witnesses in this case were called by the Government other than Grace Klemtner, who was called by the court."

By Mr. Downing: That is all right.

By Mr. Sokol: You gave me back S, your Honor. Would you be satisfied with this? What I have done is to strike out half of S. Do you have S before you?

By the Court: Yes.

By Mr. Sokol: As the court originally corrected the first sentence, it would be acceptable to me, and I would strike out then those words which followed.

By the Court: Let's see it.

By Mr. Sokol: I have been writing on this. I would end with "them or any of them."

In other words, only half of the instruction would be given.

By the Court: Yes, I will give it as modified.

1264 By Mr. Sokol: Fine.

By Mr. Downing: May I take a look at it? I have not seen the modification.

Do you want this to be rewritten or typed up?

By Mr. Sokol: Judge Barnes has the original.

By the Court: What is this, S?

By Mr. Downing: Yes.

By Mr. Sokol: Yes, that is S, your Honor.

By Mr. Downing: May I respectfully call your attention back to X?

In the last sentence there it says:

"By this I mean that the Government assumes responsibility for the statements made by such witnesses."

In view of the change that we have talked about I presume the court will modify that—"such witnesses as called by the Government."

By Mr. Sokol: Or you can use the words "these witnesses," referring to the Government witnesses.

By Mr. Downing: When you refer to two classifications of witnesses then you get into a little ambiguity as to just whom you mean, unless you spell it out.

By Mr. Bartoline: The court indicated on several 1265 occasions he believes the jurors to be reasonable persons.

By Mr. Downing: I do not dispute that fact. But, on the other hand, we have a distinction of witnesses here.

By The Court: What do you say?

By Mr. Downing: I say that this last sentence here in this instruction should be modified, like we discussed, which the court indicated its willingness to do.

"By this I mean the Government assumes responsibility for such witnesses."

If in the first sentence it is modified, then—

By the Court: I will put this down at the end.

By Mr. Downing: That is all right then.

By the Court: What about Y?

By Mr. Downing: Y again I think is covered. I do not see any necessity of spelling out any one witness. It is covered by other instructions, general instructions as to all witnesses.

By Mr. Eben: She was the only accomplice, if I recall.

By the Court: I do not think that properly sets out an instruction for accomplice witnesses.

By Mr. Sokol: Perhaps the Government will want to 1266 tender its own then.

By Mr. Eben: Of course Grace Klemtner falls in the same category.

As to characterization, I think she should also be included.

By Mr. Sokol: No. Bess Osborne is an admitted accomplice, and Grace Klemtner denies it, and the jury will determine that. That is not something to be determined here.

By the Court: I think Mania Knoll, Bess Osborne and Grace Klemtner were in exactly the same boat.

By Mr. Downing: That is right, your Honor.

By the Court: S reads:

"In weighing the testimony of each witness you should carefully scrutinize the same,"—

and

"The jury should consider whether the witness will receive or hopes to receive any reward or immunity or benefit from the prosecution of this case, or has had his or her feelings or passions enlisted against the defendants or any of them."

Is that the instruction you request me to give?

1267 By Mr. Sokol:

By the Court: I will give an accomplice instruction.

"If you find from the evidence that any witness was an accomplice in the sense that she participated in the alleged crime charged in the indictment, then I instruct you that her testimony is liable to grave suspicion and you should act upon such testimony with great care and caution and subject it to careful examination in the light of all the other evidence in the case, and you should consider the influence under which such testimony is given and whether the purpose of the witness was to obtain some benefit to herself or to gratify her malice."

By Mr. Gerber: That is all right.

By Mr. Downing: Couldn't you also say:

"or to voluntarily tell the truth"?

They are all three possibilities, one as much as the other, equally.

By the Court: Well, I will modify this, and then having modified it, will give it.

"If you find from the evidence"

I will say,

1268 "any witness was an accomplice in the same sense that she participated in the alleged crime charged in the indictment, then I instruct you that her testimony is liable to grave suspicion."

"If you find from the evidence that any witness was an accomplice"—

I will give it that way. As modified, I will give it.

By Mr. Downing: How about the addition of what I suggested, which I submit is just as much something to be considered by the jury as these other two matters that they have added: "some benefit to herself, or to gratify her malice"?

It is just as likely a witness has a desire to tell the truth.

By the Court: I don't think that is ordinarily put in the accomplice instruction. So I will just give it this way.

By Mr. Eben: I have one other very short instruction of six lines. We have marked it Request Z, which I would like the court to consider and ask you give such an instruction. I have already given a copy of it to the District Attorney.

1269. By the Court: I think we have instructions that cover that.

By Mr. Downing: It is covered.

By Mr. Eben: Not precisely. This particular instruction makes mere knowledge not enough to put a person into a conspiracy, or even approval of it. We have one instruction that has to do with association or relation, which is on the same point, but it does not go so far as to state anything having to do with knowledge, acquiescence or approval.

By Mr. Downing: If your Honor please, I submit that your conspiracy instructions which you have there, in the group of instructions, cover the matter, and this is superfluous.

By the Court: I will give Z.

By Mr. Eben: That is all we have now, your Honor. I understand you are going to modify Y or rewrite Y.

By the Court: Yes, and I will rewrite X, too and I am going to rewrite T. Now, having modified that one, S, you don't want R, do you?

By Mr. Sokol: I will withdraw R.

By the Court: Now, as to X on "All the witnesses in this case were called by the Government other than the witness Grace Klemtnr, who was called by the Court
1270 as a Court's witness."

Add that to X, if you please.

By Mr. Downing: If your Honor please, may I suggest that leaves us in the same place I was complaining about, if that is going to be the first sentence.

By the Court: It is not the first. It is added at the end.

By Mr. Downing: I just wanted to be sure.

By the Court: I am going to modify T.

Now, have you gentlemen revised your estimates as to how much time you want to talk? I suppose you want to divide your time.

By Mr. Gerber: Your Honor, I think we can use about two hours for all of us for the defense, not to exceed two hours.

By the Court: I would like to go out now and be back here at 1:30.

By Mr. Eben: That is all right. I don't want to be bound by any two hours. I said an hour per counsel, and at that time I told you Honor—if I didn't, I intended to—that I doubted extremely whether I would go that far. Your Honor pointed out to me, impliedly, that if we did, we were darn fools.

By the Court: Now, can you gentlemen put your 1271 heads together and tell me how much time you want in the aggregate, because I want to know what to tell the Government?

By Mr. Eben: If we may have two hours and a half.

Now, then, Mr. Downing, you may have not to exceed two hours and a half. I am holding these gentlemen to two hours and a half. I want you to make a fair opening.

By Mr. Downing: Sure, your Honor.

By the Court: And I use these words, "fair opening", in a technical sense.

By Mr. Downing: I understand.

By the Court: Now, how many verdicts are there? There is one where they find them all not guilty and then all guilty. Now, does it occur to anybody that this is improper, one verdict where the jury finds the defendants, all of them named, not guilty, as charged in count one of the indictment?

And, "We, the jury, find the defendants guilty as charged in count one of the indictment."

There are two forms of verdict.

Then a form as to each defendant, finding each defendant not guilty, that is, for each of the four defendants, 1272 and a guilty form as to each defendant. That is ten forms of verdict. Does it occur to anybody that is not enough?

By Mr. Gerber: Should it be referred to as count one now, as there is only one count in the indictment?

By the Court: Now, tell me, is there anything else you want?

By Mr. Eben: No, I see nothing wrong with that.

By Mr. Gerber: I just thought that since there is only one count in the indictment, why not say guilty or not guilty, as charged in the indictment?

By the Court: What is the difference?

By Mr. Gerber: I am not going to make a point of it.

By the Court: It is written up and I don't want to change it. I understand these are all right, then, Mr. Clerk.

By Mr. Eben: I am wondering, without urging on the Court, what your Honor's disposition would be to a special verdict in which the jury might find—

By the Court: No, I don't want to do that.

By Mr. Eben: I am pointing out in the record I am not making any point of it.

By the Court: I don't know what they would find as to the ultimate fact, did they conspire? Two ultimate 1273 facts. The forms of verdict I am submitting, the ten forms of verdict, cover that.

Now, I will give K, as modified.

Now, as to certain statements allegedly made by the defendants in this case having been received in evidence, I am going to tell them that they are admissible only as against the defendants who made them.

Come back at 1:30, gentlemen.

Now, have the jury come in here.

(The following proceedings were had in the presence and hearing of the jury.)

By the Court: Ladies and gentlemen, I am going to ask you to return at 1:30 today. That is one-half hour earlier than usual. The reason for that is that counsel will then address you in final argument in this case, at 1:30. I am going to ask you to be here promptly, please, at 1:30. In the meantime, remember what I have told you about discussing this case. Do not discuss it, or do not permit anyone to discuss it with you. Don't discuss it amongst yourselves until it is finally submitted to you, as it will be probably before many days have passed.

Return at 1:30.

(Whereupon a recess was taken until 1:30 o'clock p.m. of the same day, Wednesday, January 17, 1951.)

1274 * * Caption—No. 50 CR 464 * *

Chicago, Illinois,
January 17, 1951,
1:30 o'clock p.m.

Met pursuant to recess.

Present:

Mr. Downing
Mr. Owen
Mr. Gerber
Mr. Bartoline
Mr. Sokol
Mr. Eben
Mr. Watt
Mr. Weissbourd

And thereupon the following further proceedings were had herein:—

By the Court: Bring in the jury.

(Whereupon the following proceedings were had in the presence and hearing of the jury:)

1366 * * Caption—No. 50 CR 464 * *

Chicago, Illinois,
January 18, 1951,
9:00 o'clock a.m.

Met pursuant to adjournment.

Present:

Mr. Downing
Mr. Owen
Mr. Gerber
Mr. Bartoline
Mr. Sokol
Mr. Eben
Mr. Watt
Mr. Weissbourd

And thereupon the following further proceedings were had herein:—

By the Court: Proceed.

1477 Thereupon, the Court charged the jury, as follows:

By the Court: Ladies and gentlemen of the jury:

It is the duty of the court to deliver to you instructions for your guidance in the consideration of the evidence and in your deliberations upon this case.

The instructions which the court will give you, in so far as they pertain to the principles of law applicable to this case, must be accepted by you as a binding control and guide in your consideration of the evidence and in your deliberations.

The responsibility rests upon you to determine the facts of this case, under the law as the court may give it to you, uninfluenced by any expression of opinion that the court has made or may hereafter make upon matters of fact. The court has not intended at any time during the trial of this case, and does not intend at any time, to express any opinion on any matter of fact, and if the Court has expressed or does express any opinion on any matter of fact you are at liberty to disregard such opinion, and it is your duty to disregard it, if it is different from your own opinion.

1478 The first thing I wish to make plain to you is the way in which our American system of jurisprudence defines the duties of the judge on the one hand and those of the jury on the other. It is exclusively my function clearly to set forth the rules of law which govern the case, with instructions as to their application. On these legal matters you must take the law as I give it to you; you are not at liberty to do otherwise. On the other hand, you are the sole judges of the facts and I shall refer to this circumstance again to impress it upon you.

Just as you are not permitted to encroach upon my function in giving instructions on the law, so must I be careful not to encroach upon your function as the sole judges of the facts.

I have already told you not to read anything about the case in the newspapers, and I now tell you that you must not consider, in your determination of the guilt or

innocence of these defendants in accordance with these instructions, anything you may have read or heard other than the exhibits and testimony received and given in this court room. And when I say "anything", I mean it in the fullest sense of the word. This includes anything you 1479 may have read about this case or any other case.

Do not permit any extraneous matters affecting race or religion or color or anything else to affect you one iota. You must concentrate on the evidence to the complete exclusion of everything else. For this reason you are also to make quite sure that you are not in any manner affected by the nature of the charge made against these defendants. You are to consider the evidence bearing on the charge of conspiracy set up in this indictment just as you would consider the evidence bearing on any other charge of committing a crime against the laws of the United States; and the Government here must be considered in no different light than any other litigant who pleads for justice; and counsel for the Government must be considered in no different light than counsel for the defendants or for any other litigant. The law does not permit jurors to be governed by conjecture, passion or prejudice, public opinion or public feeling.

This is a criminal case, and the law in such cases is that a defendant comes into court presumed to be innocent, and that presumption protects him until such time, 1480 if such time shall come, when the jury shall believe from the evidence in the case, beyond a reasonable doubt, that the defendant is guilty as charged in the indictment or some count thereof.

The guilt of an accused is not to be inferred because the facts proven are consistent with his guilt, but, on the contrary, before there can be a verdict of guilty, you must believe from all the evidence, and beyond a reasonable doubt, that the facts proven are inconsistent with his innocence. If two conclusions can reasonably be drawn from the evidence, one of innocence and one of guilt, you should adopt the former.

The defendants on trial have pleaded not guilty. This puts the burden of proving the charges in the indictment upon the Government, and you cannot find the defendants guilty unless, from all the evidence, you believe them guilty of the offense charged in this indictment beyond a reasonable doubt.

When I refer to the indictment, ladies and gentlemen, I mean the first count of the indictment, the other counts having been dismissed by the Court.

1481 A reasonable doubt is what the term implies,—a doubt founded on reason. It does not mean every conceivable kind of doubt. It does not mean a doubt that may be purely imaginary or fanciful, or one that is merely captious or speculative. It means, simply, an honest doubt that appeals to reason and is founded upon reason. If, after considering all the evidence in the case, you have such a doubt in your mind as would cause you, or any other reasonably prudent person, to pause or hesitate before acting in a grave transaction of your own life, then you have such a doubt as the law contemplates as a reasonable doubt.

You are the sole judges of the credibility and the weight which is to be given to the testimony of the witnesses who have testified upon this trial. In weighing the testimony of each witness you should carefully scrutinize the same; consider all the circumstances under which the witness testifies; his demeanor on the stand; the relation which he bears to the Government or the defendant; the manner in which he might be affected by the verdict; the extent to which he is corroborated or contradicted by other credible evidence, and, in short, any circumstances that tend to throw light upon his credibility. And, 1482 applying these tests which I have just stated, it is for you to determine the weight which is to be given to the testimony of each witness.

Your verdict in this case must be reached from a consideration of all the evidence in the case, but if any evidence was admitted and was later stricken out, you must wholly disregard such evidence as was stricken out.

During the trial of a lawsuit it often becomes the duty of counsel for the parties to object to questions, or to evidence, and I instruct you that you shall not take into consideration against such party either such objections or the number of them, nor permit yourselves to be in any way influenced by such objections against the parties.

The fact that an indictment has been returned is not evidence; nor is the indictment evidence; and neither the indictment nor the return thereof should be considered you you in determining the guilt of the defendant. The indictment is not to be treated by you as raising any

kind of presumption or creating any kind of prejudice against the defendant. The indictment is simply the form or manner prescribed by law for preferring a charge 1483 against an individual, and must be regarded in that light, and in no other light.

The Government, by calling witnesses to the stand in this case, vouched for their credibility. By this, the court means that the Government assumes responsibility for the statements made by such witnesses and the inferences which flow from their testimony. All of the witnesses in this case were called by the Government, other than the witness Grace Klemtner, who was called by the court, as the court's witness.

If you find from the evidence that any witness was an accomplice in the sense that she participated in the alleged crime charged in the indictment, then the court instructs you that her testimony is liable to grave suspicion and you should act upon such testimony with great care and caution and subject it to careful examination in the light of all of the other evidence in the case, and you should consider the influence under which such testimony is given and whether the purpose of the witness was to obtain some benefit to herself or to gratify her malice.

There are two kinds of evidence—direct and cir- 1484 cumstantial. Direct evidence is that sort of evidence

by which a fact is proved directly and without inference from other facts, and is usually given by witnesses who saw, heard or otherwise observed some particular fact or occurrence. Circumstantial evidence is that sort of evidence by which an inference of an unknown fact is drawn from the existence of known facts. For example; if, when you went to bed at night you saw the ground was bare of snow, and in the morning when you awakened, you saw the ground covered with snow, while you had not seen the snow fall, nevertheless you can infer from the evidence you see, that it has snowed during the night. That is an illustration of what circumstantial evidence is.

Circumstantial evidence in criminal cases is the proof of such facts and circumstances connected with or surrounding the commission of the crime charged as tend to show the guilt or innocence of the party charged. If the facts and circumstances shown by the evidence in this

case are sufficient to convince the jury of the guilt of the defendants, or any of them, beyond reasonable doubt, then such evidence is sufficient to authorize the jury to find that defendant or those defendants, guilty.

1485 The law demands a conviction where there is sufficient legal evidence to show a defendant's guilt beyond a reasonable doubt, and circumstantial evidence is legal evidence.

You are not to take into consideration as against a defendant the fact that he did not testify. The law gives to a defendant an absolute privilege to testify or not to testify, as he deems best. If he does go on the witness stand and testify, then he is like any other witness. If he does not testify, that is not in any sense to be taken against him. He is exercising only the absolute right that is given him by the law. What I mean to say is that you must give full effect to the provision of the law that the fact that a defendant does not testify shall not create any presumption of guilt against him and must not be taken into consideration by you against him.

In weighing and considering the credibility of a witness, the jury should consider whether the witness has received, or hopes to receive, any reward or immunity or benefit from the prosecution of this case, or has had his or her feeling or passions enlisted against the defendants, or any of them.

This jury is composed of twelve men and women. 1486 While undoubtedly their verdict should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by comparison of views and by arguments among the jurors themselves, provided this can be done reasonably and consistently with the conscientious convictions of the several jurors. Each juror should listen, with the disposition to be convinced, to the opinions and arguments of the others. It is not intended that a juror should go to the jury room with a fixed determination that the verdict shall represent his opinion of the case at that moment. Nor is it intended that he should close his ears to the arguments of other jurors who are equally honest and intelligent with himself.

Certain statements, allegedly made by the defendants

in this case, have been received in evidence and read to you, in whole or in part. You are instructed that these statements are not to be considered by you as evidence against any defendant other than the defendant who made the statement.

The indictment in this case contains six counts. The 1487 court has dismissed all of the counts other than the

First Count. You are completely to disregard Counts 2 to 6, inclusive, of the indictment, except as those counts are, by the wording of Count One, made a part of said Count One.

Count One names as defendants Munio Knoll, alias Zygmunt Romankiewicz, Marcel Max Lutwak, Regina Treitler, Leopold Knoll and Grace Klemtner, alias Grace Klemtner Knoll. Grace Klemtner, alias Grace Klemtner Knoll, is not a defendant in this case, and you are to consider Count One as against the defendants Munio Knoll, alias Zygmunt Romankiewicz, Marcel Max Lutwak, Regina Treitler and Leopold Knoll only.

Count One, briefly stated, charges a conspiracy to obtain the entry of aliens into the United States by means of false statements and by concealing material facts and to defraud the United States of a governmental function. It is charged, in Count One, that the four defendants, Munio Knoll, Marcel Max Lutwak, Regina Treitler and Leopold Knoll, on or about July 1, 1947, and continuously thereafter up to the date of the indictment, August 7, 1950, in this District and at divers other places, did unlawfully, wilfully and knowingly conspire, combine, con-

federate and agree together and with each other, to 1488 commit offenses against the United States; that is

to say, the offenses set forth in Counts Two to Six, inclusive, of the indictment, the descriptions of which offenses will be related to you hereafter, and to defraud the United States of and concerning its governmental function and right of administering the immigration laws of the United States, of and concerning its governmental function and right of administering the Immigration and Naturalization Service of the United States Department of Justice, and of and concerning its governmental function and right to have the business and affairs of the said Immigration and Naturalization Service, in the consideration, administration, investigation and disposition

of matters affecting and affected by the Immigration and Naturalization Service conducted in its behalf honestly and free from fraud, deceit, misrepresentation, concealment of a material fact, interference and obstruction. Count One further charges that the said conspiracy was in manner and substance as follows: That in the summer of 1947 Maria Knoll, alias Maria Irena Lutwak, and the defendants Munio Knoll, alias Zygmunt Romankiewicz, and Leopold Knoll, were then and there aliens and 1489 not citizens of the United States and resided in

Paris, France; that one Bessie Benjamin Osborne and Grace Klemtner and Marcel Max Lutwak were unmarried citizens of the United States who had served in the Armed Forces of the United States during the Second World War and had theretofore been honorably discharged from such service; that it was a part of said conspiracy that Marcel Max Lutwak would, in the summer of 1947, journey from the United States to Paris, France, and there go through the form of a marriage ceremony with Maria Knoll, and that thereafter, in the year 1947, said Maria Knoll would journey to the United States and would be permitted to enter the United States for permanent residence as a non-quota immigrant by the United States immigration authorities at the Port of New York upon the representation that she was the alien spouse of a United States citizen having an honorable discharge from the Armed Forces of the United States during the Second World War under the provisions of Section 232, Title 8 United States Code; that it was further a part of said conspiracy that said Bessie Benjamin Osborne would go from the United States to Paris and go through the form of a marriage ceremony with the defendant Munio Knoll, alias Zygmunt Romankiewicz and thereafter be permitted to enter the United 1490

States for permanent residence as a non-quota immigrant upon the representation that he was the alien spouse of a United States citizen having an honorable discharge from the Armed Forces of the United States; and that it was further a part of said conspiracy that the defendant Grace Klemtner would go from the United States to Paris and there go through the form of a marriage ceremony with the defendant Leopold Knoll, and that thereafter the defendant Leopold Knoll would be

permitted to enter the United States for permanent residence as a non-quota immigrant upon the representation that he was the alien spouse of a United States citizen having an honorable discharge from the Armed Forces of the United States; that it was further a part of said conspiracy that the said marriages would be marriages in form only and would be entered into by the parties thereto solely for the purpose of representing them as marriages to the United States Immigration and Naturalization Service, and that said defendants would agree that after said ostensible marriages had been performed in Paris, France, and after said ostensible marriages had served their purpose to secure the entry of said Maria 1491 Knoll, alias Maria Irena Lutwak and Munio Knoll, alias Zygmunt Romankiewicz, and Leopold Knoll, into the United States for permanent residence as non-quota immigrants the parties to said marriages would not live together in the United States as man and wife and thereafter would take such legal steps to sever the formal bonds of said ostensible marriages as they saw fit; that it was a further part of said conspiracy that said defendants conceal such transactions and acts aforesaid and would do such other, further and different acts as they might deem necessary and expedient to prevent the disclosure to the United States Immigration and Naturalization Service of the existence of said conspiracy.

The indictment further charges that, in furtherance of and for the purpose of carrying into execution said conspiracy, the defendants performed certain overt acts. The court will not now relate the overt acts charged but you will take the indictment with you to your jury room and you may there read the charges of the indictment with respect to the overt acts charged.

The offenses against the United States, which it is alleged the defendants conspired to commit, that is, 1492 the offenses set forth in Counts Two to Six, inclusive, of the indictment, are, briefly stated, the offenses of obtaining entry into the United States as an alien immigrant by means of false statements and by concealing material facts and aiding and abetting so to do, and making false statements under oath in applications required by the immigration laws of the United States.

The law of the United States upon which this First Count is based reads, in part and so far as material here, as follows:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished."

It is not necessary, under this conspiracy count, that the Government prove that the defendants committed the offenses set forth in the other counts of the indictment, or that the defendants defrauded the United States. The charge in this First Count is that the defendants conspired to do those things.

1493 The essence of the offense of conspiracy is the unlawful combination, confederation, or agreement to commit an offense against the United States, or to defraud the United States. To "conspire" means to agree, to combine, to confederate.

It is not necessary, to constitute a conspiracy, that two or more persons should meet together and enter into an explicit and formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme was to be and the details of the plans by means of which the unlawful combination was to be effected. It is sufficient that two or more persons, in any manner or through any contrivance, positively or tacitly, come to a mutual understanding to accomplish the common and unlawful design charged.

In determining whether or not a conspiracy has been proved in this case, you should inquire into what has been done, the movements of the alleged conspirators, their conduct, their accomplishments, if any, together with all of the other facts and circumstances adduced in evidence in the case and bearing upon that issue.

Your inquiry should be: First, Did the defendants, 1494 or some of them, conspire together to do the unlawful acts charged in the indictment? And, second, if they did so conspire, Did they thereafter, with the view of carrying out the object of such conspiracy, do one thing set forth as an overt act in the indictment towards such end? If they did so conspire together and take one or

more steps, set forth as overt acts, toward the accomplishment of that unlawful purpose, the offense of conspiracy is complete, even though the object of the conspiracy is never attained.

You will observe that the Government and the grand jury have, in this indictment, charged many overt acts. An overt act means an act done for the purpose of carrying out the design, the unlawful purpose, and it must be done by one or more members of the conspiracy, if it has been found that there was a conspiracy, and must be of such a character as appears to you to have been done in order to carry out the unlawful purpose. It is not necessary that you find that all of the overt acts charged were performed, but it is necessary that you find that at least one of the overt acts charged was done, and done with the intent of accomplishing the purpose of the conspiracy, before you would be warranted in finding the defendants, or any of them, guilty under this conspiracy count.

The members of a conspiracy need not necessarily know all of the other members of the conspiracy. Of course, it is necessary that they should know some of the members of the conspiracy, but they need not know or be acquainted with or have knowledge that other members, who are later members of the conspiracy, were in the conspiracy.

A person may enter a conspiracy after it has been formed and before its final completion and assist in carrying out the conspiracy, and thereby be a part of such conspiracy, even though he was not a member of such conspiracy at the time of its inception.

During the trial, evidence has been admitted only as to certain defendants. You may consider that evidence, so limited, only as to those defendants, and not as to other defendants.

Under the First Count of the indictment, that is, the conspiracy count, the rule in respect of declarations, statements and conversations made out of the presence of the other defendants is as is next hereinafter stated. The declarations, statements and conversations of one or more defendants, made out of the presence of the other defendants, is not binding upon any other defendant, unless the evidence—not including any of such

declarations, statements or conversations other than his own—shows, beyond a reasonable doubt, that such other defendant was a participant in the conspiracy charged in the First Count of the indictment at the time of such declarations, statements or conversations, and unless, further, the declarations, statements and conversations were in furtherance of the conspiracy and made during its continuance. When men enter into an agreement for an unlawful end, they become agents for one another and have made a partnership in crime. What one does pursuant to the common purpose, all do, and declarations, statements or conversations by one in furtherance of the conspiracy and during its continuance are competent against all. It is wholly a question of fact for the jury to determine who, if any, were the members of the conspiracy charged in the First Count of the indictment, if you find there was such a conspiracy.

The jury is instructed that, under the laws of the United States of America, alien spouses of United States 1497 Citizens serving in, or having an honorable discharge certificate from the Armed Forces of the United States during the Second World War, shall, if otherwise admissible under the Immigration Laws, be admitted to the United States.

You are further instructed that under the evidence in this case, Bessie B. Osborne, Grace Klemmer, and Marcel Lutwak, were members of the Armed Forces of the United States during World War II, and were honorably discharged.

The Statute under which the aliens entered into the United States as non-quota immigrants did not vest in the immigrants an absolute right to enter into the United States. The entry of each of the aliens in the instant case into the United States was expressly on the condition that they were married to citizens of the United States who had been honorably discharged from the Armed Forces of the United States. It is a question of fact based upon the evidence in this case for the jury to determine whether or not at the time the aliens entered into the United States under the provisions of the United States Code they were in fact entering as man and wife and to thereafter reside in the United States as man and wife.

1498 "Marriage" may be defined as the civil status of one man and one woman, capable of contracting, united by contract and mutual consent for life, for the discharge, to each other and to the community, of the duties legally incumbent on those whose associations is founded on the distinction of sex. As distinguished from the civil status, it is a contract under which a man and a woman reciprocally engage to live with each other during their joint lives, and to discharge toward each other the duties imposed by law on the relation of husband and wife. In its more limited signification the term "marriage" is used to denote merely the acts, agreement, or ceremony by which two persons enter into wedlock.

The marriage of a man and woman where one of the parties thereto has a husband or wife by a prior marriage who is then living and undivorced is void.

Mutual consent is necessary to every contract and no matter what forms of ceremonies the parties may go through indicating the contrary, they do not contract if they do not in fact assent, which may always be proved. Marriage is no exception to this rule: a marriage in jest

is not a marriage at all. It is quite true that a marriage without a subsequent consummation will be valid; but if the subjects agree to a marriage only for the sake of representing it as such to the outside world and with the understanding that they will put an end to it as soon as it has served its purpose to deceive, they have never really agreed to be married at all. They must assent to enter into the relation as it is ordinarily understood, and it is not ordinarily understood as merely a pretense or cover to deceive others.

You are hereby instructed that it is for you, the jury, to determine from all of the facts in evidence what the intentions of the parties were at the time the marriage ceremonies were performed.

In order to constitute a valid marriage, the essentials common to all contracts, capacity and consent, must be present. In this connection mere words without any corresponding intention will not create the marriage relation and notwithstanding formalities indicating consent have been complied with, there is not a valid marriage where

the parties do not intend to enter into the marriage relation.

In order for a marriage to be valid, it is essential that each party have the necessary capacity to marry and that each party consent to the marriage.

1500 By capacity is meant the absence of any of the impediments imposed by law on a person's marrying, such as lack of the requisite age, physical or mental defects, or an undissolved prior marriage.

By consent is meant consent to the entry into marriage. This consent must be expressed in some affirmative manner, as where each party, during the marriage ceremony, communicates or states his consent and his intention to be bound and to assume the duties and obligations of marriage. It is sufficient if the parties intend immediately to be bound permanently, even though they do not intend forthwith to assume all the duties and responsibilities of marriage. Moreover, once there is this meeting of the minds and the marriage ceremony required by law is performed, the marriage is complete and the status of the parties as married becomes fixed by law, even though they immediately repudiate the agreement and thereafter act in total disregard of their marital rights and duties.

Although the cohabitation of the parties, subsequent to the marriage, is evidence of the existence and reality of their consent, cohabitation is not necessary to the validity of the marriage. Nor is a marriage invalid merely because it has not been consummated.

1501 If the consent of the parties is plainly expressed, a secret reservation of one of the parties will not invalidate the marriage, nor will the fact that one of the parties gave his consent to the marriage because of some ulterior motive or motives invalidate it. If the essentials of capacity and consent are present, the marriage is valid.

even though one of the parties consented because he 1502 expected some material advantage as the direct consequence of his entering into the marriage. The mere fact that one of the parties to a marriage knew and expected that by reason of entering into the marriage his coming to the United States would be facilitated does not in and of itself render the marriage invalid.

A person must be presumed to intend to do that which he voluntarily and wilfully does in fact do, and must also be presumed to intend all the natural probable and usual consequences of his acts, and conduct.

The law says we have no power to ascertain the certain condition of a man's mind. The best we can do is to infer it more or less satisfactorily from his acts.

You will bear in mind at all times that these four defendants are charged here as four individuals, the guilt or innocence of each of which must be passed on by you separately, pursuant to and in accordance with the instructions which I am about to give you.

The jury is instructed that the mere fact that these defendants have been tried together or have been indicted together is no evidence that a conspiracy existed among them. Each defendant in this case is entitled to have

1503 his or her guilt or innocence determined for himself or herself. In making this determination, you must decide whether each individual defendant knowingly or with intent became a party to a criminal conspiracy. Un-less you are satisfied beyond a reasonable doubt and to a moral certainty that each such defendant had such intent, you should find that defendant or defendants not guilty. For this purpose you will be given separate forms for verdict as to each defendant.

You must determine from all the evidence in the case, relating to the period of time defined in the indictment, whether or not a conspiracy existed. If you decide that a conspiracy did exist, you must next determine, as to each defendant, whether or not he was a member of the conspiracy. In considering whether or not a particular defendant was a member of the conspiracy, you must do so without regard to and independently of the statements and declarations of others. In other words, you must determine the membership of the particular defendant from the evidence concerning his own actions, his own conduct, his own declarations, or his own statements, and his own
1504 connection with the actions and conduct of others.

I charge you that it is not enough for the prosecution to show the existence of an agreement and the membership therein of any particular defendant. This alone would not prove that such defendant participated in the

agreement "knowingly and wilfully". With respect to each defendant, the prosecution has the further burden of proving beyond a reasonable doubt that such defendant participated in such agreement wilfully; that is, the prosecution must prove that such defendant entertained the specific intention to do one or more of the acts which are charged as the objects of the conspiracy.

I charge you that you cannot find any defendant in this case guilty of the crime charged against him or her merely from the fact, if you find it to be a fact, that he associated with, or was related to, any other defendant or defendants whom you may find guilty of the offense charged.

The mere knowledge, acquiescence, or approval of an act, without cooperation or agreement to cooperate, is not enough to constitute one a party to a conspiracy.

1505 There must be intentional participation in the transaction, with a view to the furtherance of the common design and purpose, to constitute a party a conspirator.

The sole question before you is whether the defendants named in the indictment are guilty of the charge therein laid against them. Your only task is to determine whether they or any of them are guilty or not guilty as charged. You have no concern with the guilt of any person or persons not named in the indictment or not defendants in the trial which has just drawn to a close. If the evidence or any circumstance surrounding the presentation points to the guilt of any person or persons not named in the indictment or not on trial before you, you are in no sense to consider such evidence or such circumstances except in so far as it bears upon the question of the guilt or innocence of the defendants or some of them.

You have only one duty to perform, and that duty is to tell the court whether or not the defendants are or are not guilty as charged in the indictment. Under no circumstances need you consider the matter of punishment. That is a matter committed to the attention of the court alone.

When you go to the jury room, ladies and gentlemen, you will take with you the indictment, bearing 1506 in mind what I told you, that the second, third, fourth, fifth and sixth counts have been dismissed by the Court and that you will disregard those counts, except as they are by the wording of the first count made a part of that

first count. The only count before you is the first count. To understand the first count, you will have to read the second through the sixth counts, but that only for the purpose of understanding the first count, and it is only the first count that is before you. The charge set forth in the first count, that of conspiracy, is the only count before you.

You will take that indictment, the transcript of the instructions which I have just read to you, and ten forms of verdict.

The first form which you will take with you reads as follows:

"We, the jury, find the defendants Munio Knoll, alias Zygmunt Romankiewicz, Marcel Max Lutwak, Regina Treitler and Leopold Knoll, not guilty as charged in count one of the indictment."

If you find all four of the defendants not guilty, 1507 the twelve of you will sign this form, which I have just read to you and return it with you into court.

The next form which you will take with you reads as follows:

"We, the jury, find the defendants Munio Knoll, alias Zygmunt Romankiewicz, Marcel Max Lutwak, Regina Treitler and Leopold Knoll, guilty as charged in count one of the indictment."

If you find all four of the defendants guilty, you will use this form which I have just read to you. The twelve of you will sign the form and return it with you into court.

Then there are four forms of verdict, the first one of which reads:

"We, the jury, find the defendant Munio Knoll, alias Zygmunt Romankiewicz, not guilty as charged in count one of the indictment."

If you want to make separate findings as to the defendants, use these forms. This form which I have just read to you is the form which you will use if you want to find

Munio Knoll, alias Zygmunt Romankiewicz, not guilty. 1508 If you use the form, the twelve of you will sign it and return it with you into court.

There is another form exactly similar to the one which I have just read, but in that in the place and stead of

Munio Knoll's name appears the name Marcel Max Lutwak. The same instructions that I have given you with respect to the Munio Knoll verdict applies with respect to the Lutwak verdict.

The third of these four, the name of Regina Treitler appears in it instead of the name Munio Knoll, and the same instructions with respect to this form applies as applied to the Munio Knoll form.

In the fourth of these four forms, the name Leopold Knoll applies in the place and stead of that of Munio Knoll, and the same instructions apply to this one as I have given you with respect to the verdict relating to Munio Knoll.

You will also take with you four further forms, the first of which reads:

"We, the jury, find the defendant Munio Knoll, alias Zygmunt Romankiewicz, guilty as charged in count one of the indictment."

1509 If you desire to find Munio Knoll guilty, then you will use this form—if you wish to make different verdicts with respect to the different defendants. If you so desire, you will use this form which I have just read to you. The twelve of you will sign it and return it with you into court.

Then there is a form of guilty verdict for Marcel Max Lutwak, one for Regina Treitler and one for Leopold Knoll. These are the forms you will use if you desire to make separate verdicts of guilty with respect to the individual defendants.

I suggest, ladies and gentlemen, that when you go to the jury room you first select one of your number to act as foreman or forewoman to preside over your deliberations.

You may swear the Marshals.

(Thereupon two Deputy Marshals were duly sworn.)

By Mr. Eben: Merely a matter of procedure at this point, under the rule any objections that either side has to the instructions must be made after the jury is instructed—

By The Court: I understand.

By Mr. Eben: Before they retire to deliberate, but
1510 not in their presence.

By The Court: I understood you made your objections.

By Mr. Eben: I think we may have some further ones at this point, and I respectfully suggest to your Honor—

By The Court: You may step into the jury room.

Let the alternates be discharged.

(The two alternate jurors being discharged, the jury, composed of the 12 regular jurors, then retired to deliberate upon its verdict or verdicts.)

(Whereupon, out of the presence and hearing of the jury, the following further proceedings were had.)

By Mr. Sokol: Do you think it necessary that the alternates leave before they start to deliberate?

By Mr. Gerber: The Marshal will see to that, I guess.

By Mr. Sokol: I would like to voice an objection. I believe that there was sufficient conversation with respect to the instructions which are tendered with respect to Grace Klemntner—

By The Court: You what?

By Mr. Sokol: At the time we spoke with respect to the accomplice instruction which was tendered by the 1511 defense, it was certainly never intended that accomplice statement would accompany the word of the court that Grace Klemntner had been called as the Court's witness, to suggest and take her out of context, so to speak.

By The Court: Well, now, gentlemen, I am not—

By Mr. Sokol: I feel—

By The Court: You arouse my—I gave you all the opportunity; longer than I ever gave counsel in any other case, to object, and in fairness to me you should have voiced your—

By Mr. Sokol: I am not making new objections.

By The Court: Then what are we spending time on? I will give you all the objections you made during our consideration. Why are we wasting time?

By Mr. Sokol: I am not trying to waste time. All I am suggesting is that your Honor followed the characterization of Grace Klemntner as the Court's witness with the accomplice statement. In that way it lifted Grace Klemntner, being the only accomplice in the case—

By The Court: My dear sir, I cannot put wings on your defendants for you. I never went so far, that I can remember, to give everything that counsel wanted in 1512 this case, and I gave you more opportunity to object to these than I ever gave any other counsel. Now what do you gentlemen want?

By Mr. Eben: I am trying to find out, if your Honor will bear with me—it seems, I am informed here, that your Honor gave some of the instructions which I believe were withdrawn by the Government.

By Mr. Downing: They were withdrawn because the Court already covered them in the group of instructions.

By Mr. Eben: In haec verba.

By The Court: I did not give one that was withdrawn.

By Mr. Eben: I am trying to find out. All that I would like the record to show now is that we renew all the objections we made before.

By The Court: You have all the objections, I understand you have all the objections you voiced while we were considering these instructions at great length.

By Mr. Eben: It now seems to be the proper time to interpose objections as to send the indictment in present form to the jury—

By The Court: Overruled.

By Mr. Eben: As to four defendants—

1513 By The Court: Overruled.

By Mr. Downing: Government's Exhibits 14 through 18, your Honor, heretofore there has been discussion in the record showing certain of those statements and questions have been eliminated. I have not physically removed them, and I now make a motion to physically remove them, and I have scissors and staples, and we will do it here in the court room.

By The Court: Very well.

By Mr. Eben: That has nothing to do with 18, because nothing was taken out.

By Mr. Downing: Yes. One statement on page 9.

By The Court: Unless you are sure of your point—and I am sure I didn't read anything—I wish you would withdraw your statement from the record that I read something that was withdrawn.

By Mr. Eben: As far as I recall, speaking truthfully and frankly and with sincerity, I have no recollection of anything with respect to perjury being taken out. Apparently I was not in the court room.

By Mr. Downing: No. The Judge is talking about the instructions.

By Mr. Eben: I am not talking about the instructions.

1514 By The Court: I am asking you to withdraw the statement that I read something the Government withdrew.

By Mr. Eben: I will withdraw it. I will withdraw it and I will say to you that I did not intend for you to draw any inferences—

By The Court: I don't like—

By Mr. Eben: And by inferences, I mean harmful inferences. All I had in mind was to bring it to your Honor's attention. I am not even sure that had the instructions been given, they might not have been proper, but no objection was filed to that, and I make no objection on that.

By The Court: All right.

Assemble your exhibits, gentlemen, so that the Marshal can take them to the jury room.

(And thereupon, at 1:35 o'clock p.m., proceedings herein were recessed while the jury deliberated upon its verdict or verdicts.)

1515

* * Caption—No. 50 CR 464 * *

Chicago, Illinois.

January 18, 1951.

5:55 o'clock p. m.

Met pursuant to recess.

Present:

Mr. Downing

Mr. Owen

Mr. Gerber

Mr. Bartoline

Mr. Sakol

Mr. Eben

Mr. Watt
Mr. Weissbourd

And Thereupon the following further proceedings were had herein:

(The following proceedings were had out of the presence and hearing of the jury:)

By Mr. Eben: May it please the Court, I ask leave to address your Honor because I understand from the Marshal it won't be long before he is taking the jury to dinner. There is a banquet over at the Blackstone Hotel to which I have been invited tonight, which, it is probably, will be over about 8:00 or 8:30. I was told it would be. With your Honor's permission, I would like to go to it. I am not more than ten minutes away. I will leave word with the operator where I am.

By The Court: Can't you leave somebody to look after the interests of your client while you are away?

By Mr. Eben: Mr. Watt and Mr. Weissbourd will be here, one or the other, in any event.

By The Court: If there is any need to communicate with representatives of your client, I will be at liberty to call them?

By Mr. Eben: They have full authority, just as if I were here.

By The Court: All right, that will be all right.

(Thereupon, after an intermission, the following proceedings were had at 6:08 p.m.):

By The Court: Bring in the jury.

(The following proceedings were had in the presence and hearing of the jury:)

By The Court: Have you arrived at a verdict, ladies and gentlemen?

Foreman of Jury: Yes, sir.

By The Court: You may hand the verdict to the Marshal, please.

(Handing paper to Marshal.)

By The Court: You may read the verdict, Mr. Clerk.

By the Clerk: 50 CR 464, United States of America versus Munio Knoll, et al:

We the jury, find the defendant Munio Knoll, alias Zygmunt Romankiewicz, guilty as charged in count one of the indictment.

Signed by the 12 jurors.

50 CR 464, United States of America versus Munio Knoll, et al:

We, the jury, find the defendant Marcel Max Lutwak guilty as charged in count one of the indictment.

Signed by the 12 jurors.

50 CR 464, United States of America versus Munio Knoll, et al:

We, the jury, find the defendant Regina Treitler guilty as charged in count one of the indictment.

Signed by the 12 jurors.

50 CR 464, United States of America versus Munio Knoll, et al:

1518 We, the jury, find the defendant Leopold Knoll not guilty as charged in count one of the indictment.

Signed by the 12 jurors.

By Mr. Sokol: May the jury be polled?

By The Clerk: Each juror will rise as his name is called and respond to the question that is put to him.

Neal D. Sim, is this your verdict?

By Juror Sim: It is.

By The Clerk: Jean S. Smith, is this your verdict?

By Juror Smith: It is.

By The Clerk: Charles J. Burns, is this your verdict?

By Juror Burns: It is.

By The Clerk: Oscar C. Landis, is this your verdict?

By Juror Landis: It is.

By The Clerk: Alma G. Barnes, is this your verdict?

By Juror Barnes: It is.

By The Clerk: Estelle M. Deutinger, is this your verdict?

By Juror Deutinger: It is.

By The Clerk: Agnes E. Prock, is this your verdict?

By Juror Prock: It is.

By the Clerk: Elijah Johnson, is this your verdict?

1519 By Juror Johnson: It is.

By The Clerk: Lorayne M. Blythe, is this your verdict?

By Juror Blythe: It is.

By The Clerk: Joseph P. Marella, is this your verdict?

By Juror Marella: It is.

By The Clerk: Laurence I. Parmenter, is this your verdict?

By Juror Parmenter: It is.

By The Clerk: Randall R. Howard, is this your verdict?

By Juror Howard: It is.

By The Clerk: So say you all, this is your verdict.

By The Court: You may now enter the verdict, Mr. Clerk.

Thank you for your attention to this case, ladies and gentlemen. You may now be excused. I hope you have not missed your trains and I hope you will still be able to get a train. Where do you want them to go?

The Marshal: You will report at Room 702 this building, the jury quarters, a little before 10:00 o'clock tomorrow.

1520 By Mr. Sokol: Your Honor, I respectfully ask that the bonds at present in effect stand at least until tomorrow morning.

By Mr. Eben: I have something to say on that, your Honor, at least with respect to the defendant Marcel M. Lutwak and Munio Knoll and Regina Treitler, but at least as to Munio Knoll and Marcel Lutwak. I think the bond which is presently \$1,000 should be raised to \$5,000, in view of the conviction. Marcel Lutwak and Munio Knoll have nothing in Chicago to keep them here. This, I think, is a major offense. I think the bond of a thousand dollars is very nominal. I do appreciate the connection of Regina Treitler. She is a housewife. There is a little more to tie her with respect to remaining here than there is with respect to Marcel Lutwak or Munio Knoll. But I do urge that the Court give consideration to increasing the bond from \$1,000 to \$5,000 if sentence is not to be imposed this evening.

By Mr. Bartolino: If the Court please, on behalf of Marcel Lutwak, his family is here. He has lived here in Chicago ever since he was discharged from the service, and lived here in Chicago while he was in the service. He has no reason to leave the jurisdiction, and there is
1521 no reason here to indicate that he would even think of leaving this jurisdiction.

By Mr. Gerber: As to Munio Knoll, if the Court please, he is already under bond of \$2,000 in the Immigration Department on deportation proceedings. He is also working as the manager of a couple of hotels for a friend of his, who is here in court to vouch for him. He has been working for this man in a responsible position for some time.

By The Court: Does Mrs. Treitler have children?

By Mr. Sokol: Yes, your Honor.

By Mr. Downing: Grown children.

By Mr. Sokol: Grown children.

By The Court: Where do they live?

By Mr. Sokol: In Chicago.

By The Court: Is her husband living?

By Mr. Sokol: Yes.

By Mr. Downing: I am not strongly urging her bond be increased to five thousand, but I think there should be an increase on the other two, and I am strongly urging that.

By The Court: Well, I think these bonds were too low to start with. Did I fix them?

By Mr. Bartoline: Yes, you did.

1522 By Mr. Downing: At our suggestion, your Honor. We will take the responsibility.

By The Court: I do not like to make the defendants spend money unnecessarily, but I think these bonds are low.

By Mr. Owen: Your Honor, Munio Knoll is under bond of \$3,000, a thousand here and two thousand in the deportation office. That is three thousand.

By The Court: Well, the bonds of Munio Knoll and Marcel Lutwak will be fixed at \$5,000 apiece.

By Mr. Gerber: Will your Honor grant us until tomorrow morning to make these bonds?

By The Court: That would be the most asinine thing that could be thought of. Wouldn't that be absurd? I would not even think of it.

By Mr. Gerber: The reason I asked, I asked the bondsman in the building in the event we needed a bond, if he would be available. We will make a surety bond.

By The Court: I will be back here at 11:00 o'clock, providing the District Attorney is here to approve the bond.

By Mr. Downing: I have no authority to approve a bond in our office. The one in the office authorized to 1523 approve bonds has gone home.

By The Court: Ten o'clock, will you be around here about 10:00 o'clock?

By Mr. Downing: I would like to catch a train at 6:45 or I would have to wait until 9:30.

By The Court: Can you be ready at 9:00 o'clock?

By Mr. Gerber: I will try my best.

By The Court: Your train is what?

By Mr. Downing: 6:45, then I will have to wait until 9:30.

By The Court: Where do you live?

By Mr. Downing: Glenview. I have another meeting I am supposed to be at.

By The Court: When can you get a bond?

By Mr. Gerber: I am trying to get one now. I have hopes I may be able to. His boss is here. I will ask him if he could write a check.

By The Court: I will wait here until 6:30, so that counsel can get away.

By Mr. Downing: Your Honor, how about these other matters?

By The Court: What other matters?

By Mr. Downing: Are you going to sentence them, or are you going to set that over to another date?

1524 By The Court: I have not heard any motions.

By Mr. Gerber: We would like to make some motions.

By The Court: What are they?

By Mr. Gerber: Can we make them tomorrow morning?

By The Court: Oh, no, make whatever motions you want to make now.

By Mr. Gerber: On behalf of Munio Knoll, I would like to make a motion for judgment notwithstanding the verdict, and a motion for a new trial, if the Court please.

By The Court: Any other motions?

By Mr. Sokol: Yes, we would make a motion for judgment notwithstanding the verdict, and also a motion for a new trial.

By Mr. Bartoline: I make those motions on behalf of Marcel Lutwak.

By The Court: When do you want to argue them?

By Mr. Sokol: I would need a couple of days to prepare. I have been busy Saturdays and Sundays and every day in court, and nights, and I have not had an opportunity to prepare for something like this.

By The Court: Oh, you have been preparing for two weeks intensively.

1525 By Mr. Gerber: The first part of next week, at your Honor's convenience.

By the Court: Monday morning, at 10:00 o'clock.

By Mr. Eben: Mr. Downing, you will be here until 6:30?

By The Court: I will be here until 6:30.

By Mr. Gerber: Your Honor, I do not think we can make bond tonight. There is no use keeping you here tonight.

By Mr. Downing: Then it is all right to go, your Honor?

By The Court: Yes.

By Mr. Downing: Thank you.

1526

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 50 CR 464) • •

CERTIFICATE

I hereby certify that the above and foregoing is a full, true and accurate transcript of the original shorthand notes of all of the proceedings had on the trial of the above-entitled cause on January 8, 9, 10, 11, 12, and 15, 16, 17 and 18, 1951.

Roy E. Fuller

Roy E. Fuller

Official Court Reporter

United States District Court

Northern District of Illinois

January 18, 1951.

1527 Following are Instructions 22; and a, b, c, g, i, j, n, q, s, t, u and x, submitted and given, in words and figures following, to-wit:

1528 INSTRUCTION NO.

The marriage of a man and woman where one of the parties thereto has a husband or wife by a prior marriage who is then living and undivorced is void.

1529 You will bear in mind at all times that these four defendants are charged here as four individuals, the guilt or innocence of each of which must be passed on by you separately, pursuant to and in accordance with the instructions which I am about to give you.

1530 The first thing I wish to make plain to you is the way in which our American system of jurisprudence defines the duties of the judge on the one hand and those of the jury on the other. It is exclusively my function clearly to set forth the rules of law which govern the case, with instructions as to their application. On these legal matters you must take the law as I give it to you; you are not at liberty to do otherwise. On the other hand, you are the sole judges of the facts and I shall refer to this circumstance again to impress it upon you. Just as you are not permitted to encroach upon my function in giving instructions on the law, so must I be careful not to encroach upon your function as the sole judges of the facts.

1531 This jury is composed of twelve men and women. While undoubtedly their verdict should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by comparison of views and by arguments among the jurors themselves, provided this can be done reasonably and consistently with the conscientious convictions of the several jurors. Each juror should listen, with the disposition to be convinced, to the opinions and arguments of the others. It is not intended that a juror should go to the jury room with a fixed determination that the verdict shall represent his opinion of the case at that moment. Nor is it intended that he should close his ears to the arguments of other jurors who are equally honest and intelligent with himself.

1532 The jury is instructed that the mere fact that these defendants have been tried together or have been indicted together is no evidence that a conspiracy existed among them. Each defendant in this case is entitled to have his or her guilt or innocence determined for himself or herself. In making this determination, you must decide whether each individual defendant knowingly or with intent became a party to a criminal conspiracy. Unless you are satisfied beyond a reasonable doubt and to a moral certainty that each such defendant had such intent, you should find that defendant or defendants not guilty. For this purpose you will be given separate forms for verdict as to each defendant.

1533. I have already told you not to read anything about the case in the newspapers, and I now tell you that you must not consider, in your determination of the guilt or innocence of these defendants in accordance with these instructions, anything you may have read or heard other than the exhibits and testimony received and given in this court room. And when I say "anything" I mean it in the fullest sense of the word. This includes anything you may have read about this case or any other case. Do not permit any extraneous matters affecting race or religion or color or anything else to affect you one iota. You must concentrate on the evidence to the complete exclusion of everything else. For this reason you are also to make quite sure that you are not in any manner affected by the nature of the charge made against these defendants. You are to consider the evidence bearing on the charge of conspiracy set up in this indictment just as you would consider the evidence bearing on any other charge of committing a crime against the laws of the United States; and the Government here must be considered in no different light than any other litigant who pleads for justice; and counsel for the Government must be considered in no different light than counsel for the defendants or for any other litigant. The law does not permit jurors to be governed by conjecture, passion or prejudice, public opinion or public feeling.

1534 You must determine from all the evidence in the case, relating to the period of time defined in the indictment, whether or not a conspiracy existed. If you

decide that a conspiracy did exist, you must next determine, as to each defendant, whether or not he was a member of the conspiracy. In considering whether or not a particular defendant was a member of the conspiracy, you must do so without regard to and independently of the statements and declarations of others. In other words, you must determine the membership of the particular defendant from the evidence concerning his own actions, his own conduct, his own declarations, or his own statements, and his own connection with the actions and conduct of others.

1535 I charge you that you cannot find any defendant in this case guilty of the crime charged against him or her merely from the fact, if you find it to be a fact, that he associated with or was related to any other defendant or defendants whom you may find guilty of the offense charged.

1536 In order for a marriage to be valid, it is essential that each party have the necessary capacity to marry and that each party consent to the marriage.

By capacity is meant the absence of any of the impediments imposed by law on a person's marrying, such as lack of the requisite age, physical or mental defects, or an undissolved prior marriage.

By consent is meant consent to the entry into marriage. This consent must be expressed in some affirmative manner, as where each party, during the marriage ceremony, communicates or states his consent and his intention to be bound and to assume the duties and obligations of marriage. It is sufficient if the parties intend immediately to be bound permanently, even though they do not intend forthwith to assume all the duties and responsibilities of marriage. Moreover, once there is this meeting of the minds and the marriage ceremony required by law is performed, the marriage is complete and the status of the parties as married becomes fixed by law, even though they immediately repudiate the agreement and thereafter act in total disregard of their marital rights and duties.

Although the cohabitation of the parties, subsequent to the marriage, is evidence of the existence and reality of their consent, cohabitation is not necessary to the validity of the marriage. Nor is a marriage invalid merely because it has not been consummated.

2

If the consent of the parties is plainly expressed, a secret reservation of one of the parties will not invalidate the marriage, nor will the fact that one of the parties gave his consent to the marriage because of some ulterior motive or motives invalidate it. If the essentials of capacity and consent are present, the marriage is valid, even though one of the parties consented because he expected some material advantage as the direct consequence of his entering into the marriage.

The mere fact that one of the parties to a marriage knew and expected that by reason of entering into the marriage his coming to the United States would be facilitated does not in and of itself render the marriage invalid.

1538 In weighing and considering the credibility of a witness, the jury should consider whether the witness has received, or hopes to receive, any reward, or immunity or benefit from the prosecution of this case, or has had his or her feelings or passions enlisted against the defendants, or any of them.

1539 Certain statements, allegedly made by the defendants in this case, have been received in evidence and read to you, in whole or in part. You are instructed that these statements are not to be considered by you as evidence against any defendant other than the defendant who made the statement.

1540 The jury is instructed that, under the laws of the United States of America, alien spouses of United States Citizens serving in, or having an honorable discharge certificate from the Armed Forces of the United States during the Second World War shall, if otherwise admissible under the Immigration Laws, be admitted to the United States.

You are further instructed that under the evidence in this case, Bessie B. Osborne, Grace Klemtnner, and Marcel Lutwak were members of the Armed Forces of the United States during World War II, and were honorably discharged.

1541 The Government, by calling witnesses to the stand in this case, vouched for their credibility. By this, the court means that the Government assumes responsibility for the statements made by such witnesses and the inferences which flow from their testimony. All of the witnesses in this case were called by the Government, other than the witness Grace Klemtnner, who was called by the Court, as the court's witness.

1542 And afterwards on, to wit, the 18th day of January, 1951 there were filed in the Clerk's office of said Court 4 certain Verdicts in words and figures following, to-wit:

1543

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

* * (Caption—No. 50 CR 464) * *

We, the Jury, find the defendant, Munio Knoll, alias Zygmunt Romankiewicz, guilty as charged in count one of the indictment.

Neal D. Sim
Foreman
Alma G. Barnes
Jean S. Smith
Laurence J. Parmenter
Elijah Johnson
Joseph Marella
Oscar C. Landis
Randall R. Howard
Estelle Deutinger
Charles J. Burns
Lorayne Blyth
Agnes Proch

1544

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 50 CR 464) • •

We, the Jury, find the defendant, Marcel Max Lutwak,
guilty as charged in count one of the indictment.

Neal D. Sim
Foreman
Alma G. Barnes
Jean S. Smith
Laurence J. Parmenter
Elijah Johnson
Joseph Marella
Oscar C. Landis
Randall R. Howard
Estelle Deutinger
Charles J. Burns
Lorayne Blyth
Agnes Proch

1545 6

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 50 CR 464) • •

We, the Jury, find the defendant, Regina Treitler, guilty
as charged in count one of the indictment.

Neal D. Sim.

Foreman

Alma G. Barnes

Jean S. Smith

Laurence J. Parmenter

Elijah Johnson

Joseph Marella

Oscar C. Landis

Randall R. Howard

Estelle Deutinger

Charles J. Burns

Lorayne Blyth

Agnes Proch

1546

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 50 CR 464) • •

We, the Jury, find the defendant, Leopold Knoll, not guilty as charged in count one of the indictment.

Neal D. Sim
Foreman
Alma G. Barnes
Jean S. Smith
Laurence J. Parmenter
Elijah Johnson
Joseph Marella
Oscar C. Landis
Randall R. Howard
Estelle Deutinger
Charles J. Burns
Lorayne Blyth
Agnes Proch

1547 And on the same day, to wit, on the 18th day of January, 1951, being one of the days of the regular January term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

1548

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

• • (Caption—No. CR 464) • •

This being the day to which this cause was continued for further trial again comes the United States Attorney come also the defendants Munio Knoll alias Zygmunt Romankiewicz, Marcel Max Lutwak, Regina Treitler and Leopold Knoll in their own proper persons and by their counsel and the Jury and Alternate Jurors heretofore elected, empaneled and sworn herein for the trial of this cause also come and trial of this cause proceeds and the

Jury now having heard all the evidence adduced by the parties and the arguments of counsel and instructions of the Court it is

Ordered that the Alternate Jurors Frank F. Marculis and Harold H. North be and they are hereby excused from further service in this case and the Jury retire to their rooms in charge of sworn marshals to consider of their verdict and afterward return into open Court and render their verdict and upon their oath do say:

"We, the Jury, find the defendant, Munio Knoll, alias Zygmunt Romankiewicz, guilty as charged in Count One of the Indictment."

"We, the Jury find the defendant, Marcel Lutwak, guilty as charged in Count One of the Indjetment."

"We, the Jury, find the defendant, Regina Treitler, guilty as charged in Count One of the Indictment."

"We, the Jury, find the defendant, Leopold Knoll, not guilty as charged in Count One of the Indictment."

whereupon on motion of counsel for the defendants that the Jury be polled the Clerk inquires of each and every Juror: "Is this now your verdict?" to which inquiry each and every Juror replies in the affirmative and on motion of defendant Leopold Knoll it is

Ordered that said defendant Leopold Knoll go hence without day discharged from further prosecution under the Indictment filed herein against him whereupon the defendants Munio Knoll alias Zygmunt Romankiewicz,

Marcel Max Lutwak and Regina Treitler enter herein 1549 their motions for judgment notwithstanding the verdicts and for a new trial which motions are entered and continued for hearing and disposition to January 22, 1951 at 10:00 o'clock A. M. and on motion of the United States by the United States Attorney it is

Ordered that bonds of defendants Munio Knoll alias Zygmunt Romankiewicz, Marcel Max Lutwak be and the same are hereby increased to the sum of Five Thousand Dollars (\$5,000.00) each and that said defendants be and are hereby remanded to the custody of the United States Marshal and it is

Further Ordered that bond of defendant Regina Treitler heretofore filed herein remain in full force and effect.

1550 And on, to wit, the 22nd day of January, 1951 came the Defendants, Munio Knoll, Regina Treitler and Marcel M. Lutwak, by their attorneys and filed in the Clerk's office of said Court their certain Motions For A New Trial, and Motion In Arrest Of Judgment, Respectively, in words and figures following, to wit:

1551

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 50 CR 464) * *

MOTION FOR A NEW TRIAL ON BEHALF OF THE
DEFENDANTS, MUNIO KNOEL, alias ZYGMUNT
ROMANKIEWICZ, REGINA TREITLER and MAR-
CEL M. LUTWAK.

Now come the defendants, Munio Knoll, alias Zygmunt Romankiewicz, Regina Treitler and Marcel M. Lutwak, by and through their respective attorneys, and file, in writing, their motion for a new trial, and as grounds therefor, give the following reasons:

1. The court erred in failing to dismiss the indictment herein.

2. The court erred in failing to grant the defendants' motions for a judgment of acquittal at the close of the evidence offered by the government.

3. The court erred in refusing to grant the defendants' motions for a judgment of acquittal notwithstanding the verdict.

4. The court erred in the admission of improper and illegal evidence over the objections of the defendants.

5. The court erred in unduly restricting the cross examination of witnesses offered on behalf of the government.

1552 6. The court erred in admitting into evidence certain exhibits offered on behalf of the government.

7. The court erred in giving certain instructions to the jury offered by the government and the court over the objections of the defendants.

8. The court erred in refusing to read to the jury certain instructions offered on behalf of the defendants.

Motion for New Trial

9. The court erred in calling the witness, Grace Klemtner, as a court witness.

10. The verdict is against the manifest weight of the evidence.

11. The verdict is contrary to law.

12. The evidence does not support the verdict.

13. The evidence does not sustain or prove or support the charge in the indictment herein.

14. The court erred in denying the defendants' motions for a mis-trial.

15. The court erred in permitting the indictment to be taken by the jury for use in their deliberations.

Munio Knoll, alias Zygmunt
Romankiewicz, defendant

by:

Martin S. Gerber

John Owen

His Attorneys

Regina Treitler, defendant

by:

B. H. Sokol

Her Attorney

Marcel M. Lutwak, defendant

by:

Leo J. Bartoline

His Attorney

1553

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 50 CR 464) * *

**MOTION BY DEFENDANTS, MUNIO KNOLL, alias
ZYGMUNT ROMANKIEWICZ, REGINA TREITLER
and MARCEL M. LUTWAK, IN ARREST OF JUDG-
MENT.**

Now come the defendants, Munio Knoll, alias Zygmunt Romankiewicz, Regina Treitler and Marcel M. Lutwak, by and through their respective attorneys, and move the court to arrest the judgment herein, and as grounds therefor state to the court that the indictment herein does not charge any offense under the Statutes of the United States.

Munio Knoll, alias Zygmunt
Romankiewicz, defendant

by:

Martin S. Gerber

John Owen

His Attorneys

Regina Treitler, defendant

by:

B. H. Sokol

Her Attorney

Marcel M. Lutwak, defendant

by:

Leo J. Bartoline

His Attorney

1554 And on the same day, to wit, on the 22nd day of January, 1951, being one of the days of the regular January term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to-wit:

1555

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

• • (Caption—No. 50 CR 464) • •

This cause this day coming on for hearing on the motions of the defendants Munio Knoll alias Zygmunt Romankiewicz, Marcel Max Lutwak and Regina Treitler for judgment of acquittal notwithstanding the verdict and for a new trial and for disposition on the verdict heretofore rendered by the jury finding the said defendants Munio Knoll, alias Zygmunt Romankiewicz, Marcel Max Lutwak and Regina Treitler guilty as charged in Count One of the Indictment filed herein against them comes the United States by the United States Attorney come also said defendants each in his own proper person and by his counsel and the Court having now heard the arguments of counsel and being fully advised in the premises it is

Ordered that the motions of said defendants for judgment of acquittal notwithstanding the verdict and for a new trial be and they are hereby overruled and denied thereupon said defendants enter their motion in arrest of judgment which motion is overruled and denied and said defendants enter their motions that this cause be referred to the Probation Department of this Court for a pre-sentence investigation and that said defendants be placed on probation which motions are denied and the defendants being asked by the Court if they have anything to say why the sentence and judgment of the Court should not now be pronounced upon them and showing no good and sufficient reasons why sentence and judgment should not now be pronounced it is therefore

Considered and Ordered by the Court and is the sentence and judgment of the Court upon the verdict hereto-

fore rendered by the jury finding said defendants guilty, as charged in Count One of the Indictment filed herein against them that each of said defendants Munio Knoll alias Zygmunt Romankiewicz, Marcel Max Lutwak and Regina Treitler be committed to the custody of the Attorney General of the United States or his duly authorized representative for and during a period of Two (2) Years and that each of said defendants forfeit and pay to the United States of America a fine in the sum of Ten Thousand Dollars (\$10,000.00) together with the costs and charges in this behalf expended whereupon the defendants by their counsel enter their motion for enlargement on bail pending appeal which motion is denied and the motion of said defendants for stay of execution is also denied.

John P. Barnes

United States District Judge

1556 And on the same day, to wit, the 22nd day of January, 1951, came the Defendant-Appellants; Respectively, Munio Knoll, alias Zygmunt Romankiewicz, Marcel Max Lutwak, and Regina Treitler, by their attorneys, and filed in the Clerk's office of said Court their certain Respective Notices Of Appeal in words and figures following, to wit:

1557

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

UNITED STATES OF AMERICA

vs.

MUNIO KNOLL, alias ZYGMUNT
ROMANKIEWICZ, et al

No. 50 CR 464

NOTICE OF APPEAL

Name and Address of Appellant:

Munio Knoll, alias Zygmunt Romankiewicz, 6070
Stony Island Avenue, Chicago, Illinois

Name and Address of Appellant's Attorneys:

Martin S. Gerber, One No. La Salle Street, Chicago,
Ill.

John Owen, 30 No. La Salle Street, Chicago, Illinois

Offense:

Conspiracy to defraud the United States of a governmental function and to violate the laws of the Immigration and Naturalization Service

Date of Judgment:

January 22nd, 1951.

Brief description of judgment or sentence:

That on January 22nd, 1951, the defendant herein was sentenced to: 2 years, custody of Attorney General of U. S. and fine of \$10,000.00

Name of Prison where now confined, if not on bail:

Cook County Jail.

I, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals for the Seventh Circuit, from the judgment above-mentioned, on the grounds set forth below.

Munio Knoll
Appellant

Dated: January 22nd, A. D., 1951.

1558

GROUNDS OF APPEAL

1. The verdict was contrary to the law.
2. The verdict was contrary to the evidence.
3. The court erred in giving the jury certain instructions over the objection of the defendant.
4. The court erred in refusing to give to the jury certain instructions offered on behalf of the defendant.
5. The court erred in admitting certain evidence offered by the government over the objection of the defendant.
6. The court erred in failing to dismiss the indictment herein upon the motion of the defendant.
7. The court erred in denying the motion of the defendant for judgment of acquittal at the close of the evidence on behalf of the government.
8. The court erred in refusing to enter judgment of acquittal notwithstanding the verdict.
9. The court erred in unduly restraining the defendant in cross examination of the witnesses offered on behalf of the government.

RECEIPT OF NOTICE OF APPEAL

Received a copy of the above and foregoing Notice of Appeal this 22nd day of January, A. D., 1951.

Otto Kerner, Jr.,

United States Attorney.

By Robert J. Downey

Asst. U. S. Atty.

1559

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

UNITED STATES OF AMERICA

vs.

MARCEL M. LUTWAK, et al

No. 50 CR 464

NOTICE OF APPEAL

Name and Address of Appellant:

Marcel M. Lutwak, 3543 West Madison Street, Chicago

Name and Address of Appellant's Attorney:

Leo J. Bartoline, 231 So. La Salle Street, Chicago

Offense:

Conspiracy to defraud the United States of a governmental function and to violate the laws of the Immigration and Naturalization Service

Date of Judgment:

January 22nd, 1951.

Brief description of judgment or sentence:

That on January 22nd, 1951, the defendant herein was sentenced to: 2 years in custody of the Attorney General of the United States and \$10,000 fine.

Name of Prison where now confined, if not on bail:

Cook County Jail.

I, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals, for the Seventh Circuit, from the judgment above-mentioned, on the grounds set forth below.

Marcel M. Lutwak

Appellant

Dated: January 22nd, A. D., 1951.

1560

GROUND S OF APPEAL

1. The verdict was contrary to the law.
2. The verdict was contrary to the evidence.
3. The court erred in giving the jury certain instructions over the objection of the defendant.
4. The court erred in refusing to give to the jury certain instructions offered on behalf of the defendant.
5. The court erred in admitting certain evidence offered by the government over the objection of the defendant.
6. The court erred in failing to dismiss the indictment herein upon the motion of the defendant.
7. The court erred in denying the motion of the defendant for judgment of acquittal at the close of the evidence on behalf of the government.
8. The court erred in refusing to enter judgment of acquittal notwithstanding the verdict.
9. The court erred in unduly restraining the defendant in cross examination of the witnesses offered on behalf of the government.

RECEIPT OF NOTICE OF APPEAL

Received a copy of the above and foregoing Notice of Appeal this 22nd day of January, A. D., 1951.

Otto Kerner, Jr.

United States Attorney.

By Robert J. Downey

Asst. U. S. Atty.

1561

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

UNITED STATES OF AMERICA

vs.

REGINA TREITLER, et al

No. 50 CR 464

NOTICE OF APPEAL

Name and Address of Appellant:

Regina Treitler, 35 South Central Park Avenue,
Chicago, Illinois

Name and Address of Appellant's Attorney:

Bernard H. Sokol, 11 So. La Salle Street, Chicago, Ill.

Offense:

Conspiracy to defraud the United States of a governmental function and to violate the laws of the Immigration and Naturalization Service

Date of Judgment:

January 22nd, 1951:

Brief description of judgment or sentence:

That on January 22nd, 1951, the defendant herein was sentenced to: 2 yrs. & \$10,000

Name of Prison where now confined, if not on bail:

Cook County Jail.

I, the above named Appellant, hereby appeal to the United States Circuit Court of Appeals, for the Seventh Circuit, from the judgment above-mentioned, on the grounds set forth below.

Regina Treittler

Appellant

Dated: January 22nd, A. D., 1951.

1562

GROUND OFS OF APPEAL

1. The verdict was contrary to the law.
2. The verdict was contrary to the evidence.
3. The court erred in giving the jury certain instructions over the objection of the defendant.
4. The court erred in refusing to give to the jury certain instructions offered on behalf of the defendant.
5. The court erred in admitting certain evidence offered by the government over the objection of the defendant.
6. The court erred in failing to dismiss the indictment herein upon the motion of the defendant.
7. The court erred in denying the motion of the defendant for judgment of acquittal at the close of the evidence on behalf of the government.
8. The court erred in refusing to enter judgment of acquittal notwithstanding the verdict.
9. The court erred in unduly restraining the defendant in cross examination of the witnesses offered on behalf of the government.

RECEIPT OF NOTICE OF APPEAL

Received a copy of the above and foregoing Notice of Appeal this 22nd day of January, A. D., 1951.

Otto Kerner, Jr.

United States Attorney.

By Robert J. Downey

Asst. U. S. Atty.

(Certificate of mailing attached hereto)

1563

United States of America

Northern District of Illinois

} ss:

• • (Caption—No. 50 CR 464) • •

CERTIFICATE OF MAILING

I, Roy H. Johnson, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that on January 22, 1951, in accordance with Rule 73(b) of the Federal Rules of Civil Procedure, a copy of the foregoing Notices of Appeal was mailed to:

Hon. Otto Kerner Jr.

U. S. Attorney

450 U. S. Court House

Chicago 4, Illinois

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 22nd day of January, 1951.

Roy H. Johnson

By Gizella Butcher

Clerk.

Deputy Clerk

(Seal)

1569 And the same day, to wit, the 15th day of February, 1951, came the Appellants by their attorneys and filed in the Clerk's office of said Court their certain Statement Of Points in words and figures following, to wit:

1570

Appeal to the United States Court of Appeals
For the Seventh Circuit
From the
UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 50 CR 464) * *

STATEMENT OF POINTS
TO BE RELIED UPON BY APPELLANTS
ON APPEAL

The points upon which Appellants intend to rely for purposes of this appeal are as follows:

1. The Court erred in denying defendants' motions to dismiss Count I of the indictment.

2. The Court erred in unduly restricting the cross-examination of government witness Maria Lutwak.

3. The Court erred in permitting government witness Maria Lutwak to testify over the objection of defendants that she was incompetent as being the wife of one of the defendants, and in refusing a voir dire examination with respect thereto.

4. The Court erred in allowing the government latitude in the redirect examination of government witnesses Ann Zapler and Mrs. Louis Wicker far beyond the scope of cross-examination.

5. The Court erred in admitting improper testimony with respect to acts and declarations of the defendants occurring and taking place after the alleged illegal entry of the aliens into the United States and after the termination of the alleged conspiracy.

6. The Court erred in allowing the government to impeach its own witness, Maria Lutwak, through the testimony of government witness Morris Haberman.

1571 7. The Court erred in permitting government witness Bess Osborne to testify over the objection of de-

defendants that she was incompetent as being the wife of one of the defendants, and in refusing a voir dire examination with respect thereto.

8. The Court erred in permitting Grace Klemtnr Knoll to testify over the objection of defendants that she was incompetent as being the wife of one of the defendants, and in refusing a voir dire examination with respect thereto.

9. The Court erred in calling Grace Klemtnr Knoll as a Court's witness and in permitting the government to cross-examine and impeach her.

10. The Court erred in calling Grace Klemtnr Knoll as a Court's witness at the suggestion of the government, under circumstances in which both the government and the Court were aware of the status of Grace Klemtnr Knoll as a former defendant and of the likelihood that she would be required to claim her privilege against self-incrimination on the stand, thereby prejudicing the defendants.

11. The Court erred in denying defendants' motions for a mistrial.

12. The Court erred in permitting all the testimony of government witnesses Ann Zapier, Maria Lutwak, Jane Turner, and Mrs. Louis Wicker to be considered against all the defendants.

13. The Court erred in permitting testimony of government witnesses Joseph Ludmer and Morris Haberman to be considered against all the defendants.

14. The Court erred in the admission of prejudicial and immaterial testimony, and in permitting it to be considered against all the defendants.

15. The Court erred in the admission of prejudicial and immaterial exhibits, and in permitting them to be considered against all the defendants.

1572 16. The Court erred in the admission of testimony of acts and declarations of defendants against alleged co-conspirators, which acts and declarations were not in furtherance of the conspiracy or the common design.

17. The Court erred in unduly restricting the efforts of defendants to show bias, prejudice, and hostility on the part of government witness Joseph Ludmer.

18. The Court erred in overruling defendants' motions for acquittal as to Count I.

19. The Court erred in denying defendants' motions for a new trial.

20. The Court erred in denying defendants' motions in arrest of judgment.

21. The Court erred in denying defendants' motions for acquittal notwithstanding the verdict.

22. The Court erred in declining to give timely warning to witnesses Maria Lutwak and Grace Klemtnier Knoll as to their constitutional privileges against self-incrimination.

23. The Court erred in giving instruction No. 22 proposed by the government, which instruction reads:

"The marriage of a man and woman where one of the parties thereto has a husband or wife by a prior marriage who is then living and undivorced is void."

24. The evidence is insufficient to support the charge contained in the indictment, in that the government failed to prove the invalidity of any of the marriages entered into by the various defendants under the law of the place where contracted, namely, France.

February 15, 1951

A. Bradley Eben

Richard F. Watt

Bernard Weissbourd

Attorneys for Defendants-Appellants

1573. Received a copy of the above Statement of Points to be Relied upon by Appellants on Appeal this 15th day of February, 1951.

Otto Kerner, Jr.

United States Attorney

By Robt. J. Downey

1574 And afterwards on, to wit, the 15th day of February, 1951, came the Appellants by their attorneys and filed in the Clerk's office of said Court their certain Designation Of Contents Of Record On Appeal, in words and figures following to wit:

1575

Appeal to the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

From the
UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

(Caption—No. 50 CR 464)

APPELLANTS' DESIGNATION OF
CONTENTS OF RECORD ON APPEAL

To: Clerk of the United States District Court for the Northern District of Illinois, Eastern Division.

Please prepare a transcript of record to be certified and transmitted to the United States Court of Appeals for the Seventh Circuit pursuant to the Notices of Appeal heretofore filed in the above entitled cause. In compliance with the Rules of Criminal Procedure for the District Courts of the United States, defendants in the above entitled cause, as appellants, designate the following portions of the record to be incorporated into the transcript:

1. Indictment No. 50 CR 464, returned by the July 1950 Grand Jury on August 7, 1950.

2. The motions of defendant Regina Treitler and defendants Leopold Knoll and Grace Klemtner Knoll to dismiss Count I of the indictment, and the adoption of said motions by the other defendants.

3. The pleas of not guilty entered by each and every defendant on October 9, 1950.

4. Order of court of November 27, 1950, denying defendants' motions to dismiss Count I.

1576 5. All transcripts of proceedings from January 8, 1951, through January 17, 1951, with the exception of the following pages:

(a) last 5 lines of page 69, all of pages 70-74 inclusive, and the first 8 lines of page 75.

(b) all of pages 79 and 80, and the first 13 lines of page 81.

(c) last 4 lines of page 148, all of pages 149-151 inclusive, and the first 14 lines of page 152.

(d) last 21 lines of page 230, and all of pages 231-449 inclusive.

(e) last 6 lines of page 450, and all of pages 451-461 inclusive.

(f) last 6 lines of page 570, and all of pages 571-675 inclusive.

(g) all of pages 750-752 inclusive, and the first 14 lines of page 753.

(h) last 6 lines of page 859, and all of pages 860-913 inclusive.

(i) last 4 lines of page 914, all of pages 915-1008 inclusive, and the first 21 lines of page 1009.

(j) last 16 lines of page 1033, all of pages 1034-1147 inclusive, and the first 2 lines of page 1148.

(k) all of page 1152.

(l) last 8 lines of page 1154, and all of pages 1155-1168 inclusive.

(m) last 4 lines of page 1178, and all of pages 1179 through to the end of the transcript.

6. Government instruction No. 22 given by the court to the jury on January 18, 1951.

7. The verdicts returned on January 18, 1951.

1577 8. Order of court of January 19, 1951, entering the verdicts finding the defendants Munio Knoll, Marcell Max Lutwak, and Regina Treitler guilty as charged in Count I of the indictment.

9. Order of court of January 15, 1951, dismissing Counts II, III, IV, V, and VI for want of proper venue, and denying defendants' motions for judgment of acquittal as to Count I.

10. Defendants' motion for new trial.

11. Defendants' motion for judgment of acquittal notwithstanding the verdict.

12. Defendants' motion in arrest of judgment.

13. Order of court of January 23, 1951, denying defendants' motions for acquittal notwithstanding the verdict.

for a new trial, and in arrest of judgment, and denying defendants' motions for referral to the probation department for presentence investigation and for the placement of defendants on probation, and sentencing each of the defendants, Munio Knoll, Marcel Max Lutwak, and Regina Treitler, to two years imprisonment and a fine of \$10,000.

14. Notice of appeal of defendant Munio Knoll dated January 22, 1951, and proof of service.

15. Notice of appeal of defendant Marcel Max Lutwak dated January 22, 1951, and proof of service.

16. Notice of appeal of defendant Regina Treitler dated January 22, 1951, and proof of service.

17. This designation of contents of record on appeal and proof of service.

18. In their original form all exhibits received in evidence.

19. Draft order directing the clerk to transmit exhibits in their original form, entered February 15, 1951.

20. Draft order of January 26, 1951, extending until February 16, 1951, the time within which defendants may file their designation of contents of record on appeal.

1578 21. Statement of points to be relied upon by appellants and proof of service.

22. Clerk's certificate.

23. Such other matters as by law you are required to certify.

Dated: February 15, 1951

A. Bradley Eben

Richard F. Watt

Bernard Weissbourd

Attorneys for Defendant-Appellants

Received a copy of the above Designation of Contents of Record on Appeal this 15 day of February, 1951.

Otto Kerner, Jr.

United States Attorney

By Robt. J. Downey

1579 And on the same day, to wit, on the 15th day of February, 1951, being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan District Judge, appears the following entry, to wit;

1580

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 50 CP 464) * *

O R D E R

This cause coming on to be heard on the motion of defendants and due notice having been given by defendants of their taking of an appeal from the judgments heretofore entered herein,

It Is Hereby Ordered that the clerk of this court is directed to transmit to the clerk of the Court of Appeals for the Seventh Circuit in their original form all the exhibits introduced by the government and by the defendants and admitted into evidence in the trial of this cause.

It Is Further Ordered that copies which have been or may hereafter be substituted for original documents pursuant to leave of court shall be deemed to be in original form within the meaning of this order.

Enter: Philip L. Sullivan

Dated: February 15, 1951

380 *Appellees' Supplemental Designation of Record*

1581 And afterwards on, to wit, the 21st day of Feb-
ruary, 1951, came the Appellee by its attorneys and
filed in the Clerk's office of said Court its certain Supple-
mental Designation Of Record And Proceedings To Be In-
cluded In Record On Appeal in words and figures follow-
ing, to wit:

1582

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * * (Caption—No. 50 CR 464) * *

APPELLEES' SUPPLEMENTAL DESIGNATION
OF RECORD AND PROCEEDINGS TO BE IN-
CORPORATED IN RECORD ON APPEAL

To The Clerk Of This Court:

The appellants, Munio Knoll, et al., in the above-entitled cause, have previously designated certain portions of the record and proceedings in said cause to be contained in the record on appeal in the United States Court of Appeals, Seventh Circuit. The appellee, the United States Government, plaintiff in the above-entitled cause, hereby respectfully requests that the appellants' designation of record and proceedings be supplemented in the following respect:

1. Appellees' designation of record item No. 5 should be amended to read, as follows: All transcripts of proceedings in the said cause for the dates January 8, 9, 10, 11, 12, 15, 16, 17, & 18, 1951; that is to say, the entire transcript of record from page 1 through page 1474.
2. Appellees' designation of record item No. 9 should be amended in that the date of the order of court is January 16, 1951 in lieu of January 15, 1951.
3. Appellees' designation of record item No. 13 should be amended in that the date of the order of court is January 22, 1951 in lieu of January 23, 1951.
4. Appellees' designation of record item No. 11 should be eliminated because it is an "oral" order and as such is incorporated in other items designated by the defendant-appellants.

1583 5. That appellees' designation of record item No. 18 should be modified so as to designate the exhibits as: Government Exhibits Nos. 1 through 28; defendant Munio Knoll's Exhibits Nos. A and B, with interpretation and translation of defendant Munio Knoll's Exhibit A, which said translation was provided by the Government.

6. Order of court entered January 17, 1951 denying defendants' motion for judgment of acquittal as to Counts 2, 3, 4, 5 and 6; defendants rest; both sides rest; etc.

7. Defendants' instructions a, b, c, g, i, j, n, q, s, t, u, and x as offered by the defendants and as given by the court to the jury on January 18, 1951.

8. Notice of Appeal of the United States of America, dated February 12, 1951.

9. Statement of points to be relied upon by the United States of America on appeal as to dismissal of Counts 2, 3, 4, 5 and 6, dated February.....

Otto Kerner, Jr.

Otto Kerner, Jr.

United States Attorney

1587 And afterwards, to wit, on the 23rd day of February, 1951, being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Phillip L. Sullivan, District Judge, appears the following entry, to wit:

1588

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 50 CR 464) * *

O R D E R

The Court being fully advised in the premises, it is Ordered that the motion of the plaintiff to have the Designation and Supplemental Designation of Record heretofore filed in this Court by the parties hereto in the appeal to the Court of Appeals of the defendants Munio Knoll, Regina Treitler and Marcel Max Luiwak in the said matter be and the same are hereby made by designated as the

Contents of the Record in the appeal to the Court of Appeals by the United States of America in the said matter.

It Is Further Ordered that the Clerk of the District Court shall prepare in both of the said appeals a single transcript of record to be forwarded in both appeals to the Court of Appeals; that further the printed record of appeal on behalf of the defendants Munio Knoll, Regina Treitler and Mareel Max Lutwak be and the same is hereby designated as the printed record of appeal for the United States of America in their appeal in the said matter.

Enter:

Philip L. Sullivan
Judge

1589

United States of America }
Northern District of Illinois } ss:

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with the Appellants' Designation and Appellee's Supplemental Designation filed in this Court in the cause entitled: United States of America, Plaintiff, vs. Munio Knoll, alias Zygmunt Romankiewicz, Marcel M. Lutwak, Regina Treitler, Leopold Knoll, and Grace Klemtner alias Grace Klemtner Knoll, Defendants, No. 50 CR 464, as the same appear from the original records and files thereof now remaining among the records of the said Court in my office, except the Original Exhibits which are incorporated herein by direction of this Court.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 2nd day of March, 1951.

Roy H. Johnson
Clerk

Gizella Butcher
Deputy Clerk

(SEAL)

1590

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

(Caption—Nos. 10326, 10327, 10328)

NOTICE UNDER RULE 14
WITH RESPECT TO PRINTING OF RECORD ON
APPEAL

To Clerk of United States Court of Appeals for the
Seventh Circuit:

Please take notice that pursuant to Rule 14 of the Rules of the United States Court of Appeals for the Seventh Circuit the defendants-appellants hereby state that it is their intention and desire to print the record through a printer of their own designation and to supervise said printing themselves. For this purpose the defendants-appellants state that they are designating the Scheffer Law Printing Company, 118 South Clinton Street, Chicago, Illinois, as their printer, and they hereby authorize the Scheffer Law Printing Company to withdraw the transcript of record from the office of the Clerk of the United States Court of Appeals for the Seventh Circuit.

Please take notice further that the defendants-appellants hereby designate the following portions of the record to be printed:

1. The portions of the record required by subparagraph "a" of Rule 14.

2. All the balance of the record, other than the transcript of proceedings, with the exception of the following:

(a) Notice of appeal by the United States dated February 12, 1951.

1591

(b) Government Exhibits 1-28 inclusive admitted into evidence and Munio Knoll's Exhibits A and B, and the translation of Exhibit A, admitted into evidence.

(c) The statement of points to be relied upon by the United States on appeal as to the dismissal of Counts II, III, IV, V, and VI.

(d) The draft order of January 26, 1951, extending until February 16, 1951, the time within which defendants may file their designation of contents of record on appeal.

384 *Notice Under Rule 14 re Printing of Record*

3. The transcript of proceedings for the dates January 7, 8, 9, 10, 11, 12, 15, 16, 17, and 18, 1951, with the exception of the following lines and pages:

- (a) last 4 lines of page 148, all of pages 149-151 inclusive, and the first 14 lines of page 152.
- (b) last 21 lines of page 230, and all of pages 231-449 inclusive.
- (c) last 6 lines of page 450, and all of pages 451-461 inclusive.
- (d) last 6 lines of page 570, and all of pages 571-610 inclusive, and the first 16 lines of page 611.
- (e) last 8 lines of page 614, and all of pages 615-669 inclusive.
- (f) last 2 lines of page 670, and all of pages 671-675 inclusive.
- (g) last 18 lines of page 750, all of pages 751 and 752, and the first 14 lines of page 753.
- (h) last 6 lines of page 859, and all of pages 860-911 inclusive, and the first 15 lines of page 912.
- (i) last 4 lines of page 916; all of pages 917-956 inclusive, and the first 4 lines of page 957.
- (j) last 7 lines of page 957, all of pages 958-1008 inclusive, and the first 21 lines of page 1009.

1592

- (k) last 16 lines of page 1033, all of pages 1034-1147 inclusive, and the first 2 lines of page 1148.
- (l) last 4 lines of page 1223, all of pages 1224-1314 inclusive.
- (m) last 5 lines of page 1315, all of pages 1316-1425 inclusive.

And please take notice further that in connection with their appeals and with this designation of the portions of the record to be printed on appeal, the defendants-appellants do not intend to and will not rely on or make any point with respect to any error as to the admission into evidence of any of government exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18, except insofar as defendants-appellants contend, and reserve their right to urge on appeal, that some one or more of said exhibits was improperly admitted as against all of the defendants. This statement is made with particular reference to the wording of Points 5, 14, 15, 16, and 24 of the statement of points to be relied upon by appellants on appeal heretofore filed and incorporated into the rec-

ord. The purpose of this statement is thus to clarify the points upon which appellants do rely, and particularly to indicate the reason why appellants do not believe that the testimony of government witnesses Sigurdson, Lawson, Plzak, Osterkorn, Alfano, Hansen, Connolly, and Stern, need be printed for a proper consideration of the questions presented by appellants' appeals. The testimony of these witnesses has therefore been omitted from the portions of the transcript of proceedings to be printed on appeal, such testimony appearing on the last 21 lines of page 230 and on all of pages 231 to 449 inclusive.

A. Bradley Eben
Richard F. Watt
Bernard Weissbourd
Attorneys for Defendants-Appellants

1593

A. Bradley Eben
208 South La Salle Street
Central 6-1763
Richard F. Watt
Board of Trade Building
Harrison 7-2195
Bernard Weissbourd
135 South La Salle Street
Financial 6-3535

Received a copy of the above notice this 16th day of March, 1951.

Otto Kerner, Jr.
United States Attorney
per Edw. J. Ryan
Asst. U. S. Atty.

1594

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

• • (Caption—Nos. 1326, 1327, 1328) • •

PLAINTIFF-APPELLEE'S SUPPLEMENTAL
DESIGNATION OF PRINTING OF RECORD
ON APPEAL

To Clerk of The United States Court of Appeals For
The Seventh Circuit:

The defendants-appellants have heretofore filed pursuant to Rule 14 their designation of the portion of the record in the above-captioned matters to be printed in accordance with the provision of Rule 14(b) of this Court. The plaintiff-appellee hereby designates the following additional portion of the record to be printed in connection with the printing of the record in the above-captioned matters.

1. The portion of the Transcript of Proceedings for January 10, 1951 commencing with page 405 through page 436.

UNITED STATES OF AMERICA,

Plaintiff-Appellee

By Otto Kerner, Jr.,
United States Attorney.

U. S. C. A.-7

Filed March 23, 1951

Kenneth J. Carrick, Clerk.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit,
Chicago 10, Illinois.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed transcript of record, filed June 1, 1951, in:

Cause No. 10326.

The United States of America,
Plaintiff-Appellee,

vs.

Marcel Max Lutwak,
Defendant-Appellant.

Cause No. 10327.

The United States of America,
Plaintiff-Appellee,

vs.

Munio Knoll,
Defendant-Appellant.

Cause No. 10328.

The United States of America,
Plaintiff-Appellee,

vs.

Regina Treitler,
Defendant-Appellant.

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 2nd day of May, A. D. 1952.

(Seal)

Kenneth J. Carrick,
*Clerk of the United States Court of
Appeals for the Seventh Circuit.*

At a regular term of the United States Court of Appeals for the Seventh Circuit, held in the City of Chicago and begun on the second day of October, in the year of our Lord one thousand nine hundred and fifty-one, and of our Independence the one hundred seventy-sixth:

10326 The United States of America,
Plaintiff-Appellee,
vs.
 Marcel Max Lutwak,
Defendant-Appellant.

10327 The United States of America,
Plaintiff-Appellee,
vs.
 Manio Knoll,
Defendant-Appellant.

10328 The United States of America,
Plaintiff-Appellee,
vs.
 Regina Treitler,
Defendant-Appellant.

} Appeals from the
 United States Dis-
 trict Court for the
 Northern District
 of Illinois, East-
 ern Division.

And afterwards, to-wit, on the fifth day of December, 1951, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Wednesday, December 5, 1951.

Before:

Hon. J. Earl Major, Chief Judge.
Hon. F. Ryan Duffy, Circuit Judge.
Hon. Walter C. Lindley, Circuit Judge.

10326 The United States of America,
Plaintiff-Appellee,
vs.
Marcel Max Lutwak,
Defendant-Appellant.

10327 The United States of America,
Plaintiff-Appellee,
vs.
Munio Knoll,
Defendant-Appellant.

10328 The United States of America,
Plaintiff-Appellee,
vs.
Regina Treitler,
Defendant-Appellant.

Appeals from the
United States Dis-
trict Court for the
Northern District
of Illinois, East-
ern Division.

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of record and on the briefs of counsel and on oral argument by Mr. A. Bradley Eben, counsel for the appellants, and by Mr. James B. Parsons, counsel for the appellee, and the Court takes this matter under advisement.

And afterwards, to-wit, on the third day of January, 1952, there was filed in the office of the Clerk of this Court the opinion of the Court, which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

October Term and Session, 1951.

10326 The United States of America,
Plaintiff-Appellee,
vs.

Marcel Max Lutwak,
Defendant-Appellant.

10327 The United States of America,
Plaintiff-Appellee,
vs.

Munio Knoll,
Defendant-Appellant.

10328 The United States of America,
Plaintiff-Appellee,
vs.

Regina Treitler,
Defendant-Appellant.

Appeals from the
United States Dis-
trict Court for the
Northern District
of Illinois, East-
ern Division.

January 3, 1952.

Before MAJOR, Chief Judge, DUFFY and LINDLEY, Circuit Judges.

LINDLEY, Circuit Judge. Marcel Max Lutwak, Munio Knoll, alias Zygmunt Romankiewicz, and Regina Treitler were indicted jointly with Leopold Knoll, who was found not guilty, and Grace Klemtner, dismissed by the court, upon a count charging conspiracy to commit offenses against the United States, that is, to violate Sections 180a

and 220(c), Title 8 U. S. C., each of which forbid obtaining entry into the United States by a willfully false or misleading representation, statement or document required by the immigration laws; and to defraud the United States of its governmental functions and its right to administer its immigration laws, by effectuating the illegal entry of three aliens into the United States as spouses of United States citizens having honorable discharges from service in the Armed Forces of the United States during the Second World War, as provided by Section 232, Title 8 U. S. C. commonly known as the War Bride Act. Counts charging substantive offenses and aiding and abetting were dismissed for lack of proof or proper venue. Lutwak, Knoll and Treitler were found guilty and sentenced by the court and have perfected this appeal. We are concerned only with the charge of conspiracy and the proceedings thereunder.

In substance the conspiracy count charged that the parties conspired to have Marcel Lutwak, Bessie Osborne and Grace Klemtner, each of whom was an honorably discharged veteran of the Second World War, proceed to Paris, France, and there falsely pretend to marry respectively Maria Knoll, Munio Knoll and Leopold Knoll, all three of whom were of foreign nationality, and to bring them into this country as spouses of the veterans and thus to violate the immigration quota laws. It is readily apparent that an essential element of the crime charged lay in the averment that the three Parisian ceremonies were in fact not true marriages but spurious in character, for, if valid marriages came into being, the fact that the motives back of them were entries into this country would be wholly immaterial. Consequently, the contest in the trial court centered largely about these two factual questions, viz., did defendants conspire and, if so, did the government prove by competent evidence that the marriages were in fact invalid.

In so far as the issue of common purpose and design is concerned, we think it clear that the court properly overruled the motion for acquittal and submitted the issue to the jury. The evidence, in its aspects most favorable to the government, warranted a jury finding that the following are the facts. Regina Treitler, a sister of Munio Knoll and Leopold Knoll and an aunt of Marcel Lutwak, in 1947 was living in Chicago; her nephew Lutwak also lived in that city. The two male Knolls, brothers of Treitler and uncles of Lutwak, were in Paris. Maria Knoll was likewise in

Paris. She had been married to Munio Knoll in 1932.¹ Mrs. Treitler, in the summer of 1947, inquired of a friend, Anne Zapler, whether the latter knew of veteran girls who would be willing to go to Europe to marry her brothers and bring them to the United States, telling her that they had been in concentration camps and were in a sorry plight. Mrs. Treitler said that "they" wanted someone who had been in service; that she would see that the girls' ways were paid; that the marriages need not be consummated, and that divorces could be obtained after six months. Lutwak also talked to Mrs. Zapler about the suggested action. Following these conversations, in September, Mrs. Zapler introduced Bessie Osborne to Lutwak as an ex-Wave, who, later the same month, told Mrs. Zapler that Osborne had consented to go and that "they" were happy about it. During the summer, in August, Lutwak went to Paris, there married his aunt, Marie Knoll, the undivorced or divorced wife of his Uncle Munio, and brought her to America as a war bride, leaving her husband or former husband, his uncle, in Paris with his brother, Leopold Knoll, who had been present at this ceremony. Shortly later Lutwak told Mrs. Zapler that Bessie Osborne had consented to go to Paris. Mrs. Treitler also talked to Grace Klemtner, telling her that she, Treitler, was going to Paris, and proposed that Grace do likewise.

Lutwak told Osborne that his family wanted to bring his Uncle Leopold to the United States; that he was in search of a woman who had been in service to marry this uncle and bring him into this country; that he would pay \$1,000 and that within six months she could have a divorce. Treitler told her substantially the same. Lutwak also said to her than he had another uncle in Paris, Munio Knoll, who was married and whose wife was in America and that the family wanted to effectuate a reunion between the two. We bear in mind that shortly before that time, Lutwak had gone through a marriage ceremony with Marie, his aunt, whom, he told Osborne, he desired to reunite with her husband, his Uncle Munio, by bringing the latter to America. He then asked Osborne if she would marry Munio instead of Leopold. He agreed to pay her \$500, and did pay for clothes she bought for the trip. What we have recounted is not a complete narration of all the facts and

1. Whether she had been legally divorced from him is not determinable from the record.

circumstances of record up to November 1, 1947, but will serve as a brief resume of the salient essentials.

Following the events related, Mrs. Treitler and Bessie Osborne went, on October 25, 1947, by airplane, to Paris, where, for the first time, Osborne met Munio Knoll. On November 3, she participated in a marriage ceremony with him. The two remained in Paris, living at different places, until November 12, 1947, when, after having ostensibly complied with the requirements of the War Bride Act, they left Paris by airplane for Chicago. Before they left, Treitler promised Osborne \$1,000. During her stay in Paris, Osborne attended the marriage ceremony of Grace Klemtner and Leopold Knoll, the latter of whom Lutwak had first suggested she marry. Upon her return to Chicago, Lutwak, in Munio's presence, gave her a check for \$1,000.

On November 1, 1947, one week after Treitler and Osborne left this country, Grace Klemtner followed them by air. She took with her her discharge from the army. There on November 2 or 3, she met, for the first time, Leopold Knoll. On November 6, she married him. While in Paris, she and Leopold lived at different hotels; and, very shortly, she proceeded, unaccompanied, to England for a short visit. She returned to New York in December, 1947. Leopold entered New York under the provisions of the War Bride Act, in early December 1947. The two did not live together. She proceeded immediately to California where she remained until she appeared before the grand jury in Chicago, about April 1, 1950. After that time, she testified, she lived with him.

From this evidence the jury was fully justified in finding that a concerted scheme was hatched in the summer of 1947 by the prime movers, Lutwak and Treitler, whereby they would obtain, by means of marriages with the three veterans, entry of their three relatives into this country; that this plan sprang from the brains of the two and was communicated to and joined by the girls and the aliens; that it culminated in the entries claimed to be illegal. Here was evidence of a common design, carried into execution by the interrelated, coordinated conduct of the several parties, who progressively pursued the one object. In the face of this evidence, we can not say, as a matter of law, that there was more than one scheme, for it was sufficient to justify the jury in finding that there was one over-all common design and purpose. Thus, in *Braverman v. United*

States, 317 U. S. 49, the court, at page 54, said: "The allegations in a single count of a conspiracy to commit several crimes is not duplicitous, for 'The conspiracy is the crime, and that is one, however diverse its objects.' *Frohwerk v. United States*, 249 U. S. 204, 210; *Ford v. United States*, 273 U. S. 593, 602; *United States v. Manton*, 107 F. 2d 834, 838. A conspiracy is not the commission of the crime which it contemplates, and neither violates nor 'arises under' the statute whose violation is its object. *United States v. Rabinowich*, *supra*, 87-89; *United States v. McElwain*, 272 U. S. 633, 638; see *United States v. Hirsch*, 100 U. S. 33, 34, 35. Since the single continuing agreement, which is the conspiracy here, thus embraces its criminal objects, it differs from successive acts which violate a single penal statute and from a single act which violates two statutes. See *Blockburger v. United States*, 284 U. S. 299, 301-4; *Albrecht v. United States*, 273 U. S. 1, 11-12." See also *Blumenthan v. United States*, 332 U. S. 539, 558; *Ford v. United States*, 273 U. S. 593, 602; *United States v. Rabinowich*, 238 U. S. 78, 87-89; *United States v. Coplon* (D. C., N. Y.), 88 F. Supp. 912. The evidence relied upon by the government reflected substantial basis for the finding of the jury, which necessarily determined by its verdict that the defendants understood and knowingly participated in a coordinated scheme of conduct. Thus, as the Supreme Court said in *American Tobacco Company v. United States*, 328 U. S. 781, 809-810, "Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified." See also *United States v. Masonite Corporation*, 316 U. S. 265, 275; *United States v. Mack* (C. A. 2d), 112 F. 2d 290, 292-293; *United States v. Harrison*, CA-3, 121 F. 2d 930, 934; *Allen v. United States*, CA-7, 4 F. 2d 688, 691.

However, before the jury could properly conclude that the scheme became an illegal conspiracy, it was necessary that the evidence be sufficient to justify a conclusion that the three marriages were void,—of no legal effect, and that they were so intended, for, if they were valid, the government cannot complain. In other words, whatever the motives of the participating parties in getting married, if they had bona fide intentions to enter into the marital relation, they had a perfect right to invoke the provisions of the War Bride Act in gaining access to this country. We are

confronted, then, with the crucial question of whether the evidence justified a finding that the so-called marriages were void.

A sham marriage, void under the law of this country as against public policy, can have no validity. *Lincoln v. Riley*, 217 Ill. App. 571. In the language of the Second Circuit, in *United States v. Rubenstein*, 151 F. 2d 915 (CA-2), where the court cites many authorities: "Mutual consent is necessary to every contract; and no matter what forms or ceremonies the parties may go through indicating the contrary, they do not contract if they do not in fact assent, which may always be proved. * * * Marriage is no exception to this rule: a marriage in jest is no marriage at all." The court proceeded: "if the spouses agree to a marriage only for the sake of representing it as such to the outside world and with the understanding that they will put an end to it as soon as it has served its purpose to deceive, they have never really agreed to be married at all. They must assent to enter into the relation as it is ordinarily understood, and it is not ordinarily understood as merely a pretense, or cover, to deceive others." Furthermore a marriage void ab initio is void for all purposes and has no standing in court. *McCullen v. McCullen*, 147 N. Y. S. 1069, 1071; *Hooper v. McCaffery*, 83 Ill. App. 341, 356-357; *McClurg v. Terry*, 21 N. J. Eq. 225.

Bearing in mind the principles enunciated, we examine briefly the evidence bearing upon this issue. The intent of the parties is largely reflected by what we have said as to their actions culminating in the entries into the United States. We have seen the design of Treidler and Lutwak to send veterans, including Lutwak himself, to Europe to marry their three relatives and bring them in as spouses of those veterans; we have observed their statements to the two women, Osborne and Klemtnier, that they would be paid for their services, that the marriages need not be consummated, that they could obtain divorces within six months, that Lutwak proposed at first that one girl marry one uncle and later suggested that she marry the other one; that he suggested that one uncle, Munio, be brought to America to reunite with his wife, though shortly before, Lutwak, a veteran, had himself gone through a marriage ceremony with that wife and brought her from Europe as a war bride, and that the girls knew their proposed bridegrooms not at all. In addition, there was evidence that Maria, after entry as the purported bride of Lutwak,

lived with her former husband Munio after he was brought in, though the latter had gone through a purported marriage with Osborne, and after she, Maria had herself, gone through a purported ceremony with Lutwak; that she was later divorced from Lutwak; that Osborne never lived with her purported husband, Munio Knoll; that about six months after their purported marriage, when she proposed divorce, he asked her to wait until he could be naturalized; that, finally, despite his request in November, 1950, she filed suit for divorce, which he requested her to delay until after the trial of this cause; that Klemtnier, (called as a court witness), testified that she never received a wedding ring from Leopold; that she and he lived separate and apart in Paris and in America, until she appeared as a witness before the grand jury in 1950, when, for some unexplained reason, she began to live with him. Many circumstances corroborating or cumulative to the foregoing appear in the record.

In the present case the court charged the jury fully and correctly as to the law, substantially in the words quoted from *United States v. Rubenstein, supra*, and advised the jurors that it was a question of fact for them to determine from the evidence whether at the times the aliens entered the United States the respective parties were in fact married and were entering as man and wife, and that, in determining that question, they should bear in mind the legal principles mentioned. By its verdict the jury has settled the question.

Defendants assert error in the admission of the testimony of the three alleged wives on the ground that the spouse of a defendant in a criminal cause is incompetent. Obviously, if it were undisputed that the three marriages were in fact valid, the witnesses were incompetent; but, as we have shown, the question of whether those marriages were in fact valid or invalid was controverted. The court carefully advised the jury that it was a question of fact for it to decide from all the evidence. It instructed the jurors at length concerning the essentials of such proof, so that they were fully informed that it was necessary for them to determine, before they could arrive at a verdict of guilty, that the marriages were invalid. By its verdict, they were invalid. Hence, it is established that no one of the then so-called wives was in fact married to any one of the three men; that, in each instance, the two participants in the ceremony were never actually husband and wife, but

that each marriage was void and spurious. Consequently the women were not incompetent witnesses.

Defendants insist that the court should have charged the jury that there is a presumption of validity of a marriage. But when validity is denied and attacked by affirmative evidence of invalidity, whether the presumptions have been overcome becomes a question of fact for the jury. *Hooper v. McCaffery*, 83 Ill. App. 341.

Defendants urge that the court erred in calling Grace Klemtner as a court witness and in permitting the government to cross-examine her. In the course of the trial, the United States Attorney said to the court that Grace Klemtner, who, it had been alleged had gone through a marriage ceremony with defendant Leopold Knoll and "is a person who could be considered as a witness" was present but that the government would not vouch for her truthfulness and veracity and did not desire to put her on the stand as its witness and asked whether the court felt it should call her. The court remarked that she had been a defendant whose constitutional rights he thought had been invaded and that he had accordingly discharged her, but that the evidence indicated that she was a witness to certain things in which the court was directly concerned and that, therefore, it should and would call her as its witness.

We see no error in this respect. Indeed, it is generally recognized that where there is a witness to a crime for whose veracity and integrity the prosecuting attorney is not willing to vouch, he is not compelled to call the witness, but that the court, in its discretion, may do so and allow cross-examination by both sides within proper bounds. This rule was expounded at some length in the case of *Litsinger v. United States*, 44 F. 2d 45 (CA-7), and in *Chalmette Petroleum Corp. v. Chalmette Oil Dist. Co.*, 143 F. 2d 826 (CA-5); what is said there is controlling here.

Defendants insist that the court unduly restricted their cross-examination of the witnesses Joseph Ludmer and Maria Knoll. In examining the latter, the government did not carry its direct examination beyond a showing of the fact that there had been an earlier marriage. Defendants sought on cross-examination to go beyond the scope of the direct examination and to go into the question of a sabbatical divorce between her and Munio, of the hotels most frequented in Paris by displaced persons, of how she arrived in Paris, of why her husband had changed his name and into other matters far beyond the scope of the direct exam-

ination. The court advised counsel that his questions were not within the scope of proper cross-examination but that if he wished to use the witness later as his own to prove the facts then sought to be elicited, he would have an opportunity to do so. To some of defendants' questions put to Ludmer the court sustained objections. Thus, one question was, "This is not the first time you have turned people into the authorities, is it?" At another point, he was asked whether he had discussed a certain letter from Mrs. Ludmer to Munio Knoll. He testified that he had no knowledge that the letter was sent, that he did not know it was going to be mailed and that, before it was sent, if it was sent, he had no conversation with his wife relative to sending it. What he and his wife may have said to each other, the court thought was wholly immaterial. In another instance, the court refused to allow counsel for defendants to ask Ludmer where his wife could be found, in the event they chose to subpoena her as a witness. All the matters to which defendants refer were clearly beyond the scope of the direct examination. We conclude that the action of the court was within the principles approved by this court in *United States v. Glasser*, 116 F. 2d 690 (CA-7) and *United States v. Hornstein*, 176 F. 2d 217 (CA-7).

We have examined defendants' objections to the charge to the jury and have read the charge in its entirety. It was thorough and complete, covering every phase of the case, impartially and freely. It demonstrated an earnest effort upon the part of the trial court to instruct the jury as to each possible defense suggested by the defendants. The language we have heretofore used in *United States v. Fleenor*, 162 F. 2d 935 (CA-7) and *United States v. Kaadt*, 171 F. 2d 600 (CA-7), is applicable.

Complaint is made that the court permitted evidence of events in America subsequent to the entries. When we remember that this case turned almost entirely upon the question of the validity of the Parisian marriages and that whether they were valid, in turn, depended upon the intent of the parties at the time the ceremonies occurred, it is clear that not only what was said and done prior to the time of the marriages, but that the conduct of the parties and their statements after they returned to America were relevant and competent for the jury to consider in determining whether in fact they reflected an intent to have performed valid marriages or whether they tended to show that the intent was merely to pretend to be married.

Defendants argue that this case illustrates a merger of a conspiracy with substantive offenses and that, therefore, a verdict of guilty of conspiracy can not be sustained. The rule that if two or more persons jointly commit a crime, they may not be convicted of a conspiracy to commit it, does not apply where parties other than the persons who commit the substantive offense have joined in a conspiracy to bring it about. Obviously, if more than one commit a crime, there may be others engaged in a conspiracy to have it committed who do not themselves take part in its commission. So here Treidler was not a party to any one of the invalid marriages or to the false statements made there after to the immigration authorities, which constituted the essential events comprising the substantive offenses, but, under the government's evidence, she participated in, if she did not actually originate, the scheme to have the substantive offenses committed. Moreover the conspiracy contemplated not only a course of conduct culminating in one illegal marriage but three. Each ceremony was between different parties, yet the conspiracy contemplated that the several actors should commit the several substantive offenses. Hence, we conclude there was no merger of the offenses and that the rule expressed in *Pinkerton v. United States*, 328 U. S. 640 applies. "It has long been and consistently recognized by the court that the commission of a substantive offense and a conspiracy to commit it are separate and distinct offenses. The power of Congress to separate the two and affix to each a different penalty is well established."

The judgment is affirmed.

And on the same day, to-wit, on the third day of January, 1952, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Thursday, January 3, 1952.

Before:

Hon. J. Earl Major, Chief Judge.

Hon. F. Ryan Duffy, Circuit Judge.

Hon. Walter C. Lindley, Circuit Judge.

| | |
|--|--|
| The United States of America, <i>Plaintiff-Appellee,</i> 10326 <i>vs.</i> Marcel Max Lutwak, <i>Defendant-Appellant.</i> | } Appeal from the United States Dis- trict Court for the Northern District of Illinois, Eastern Division. |
|--|--|

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Thursday, January 3, 1952.

Before:

Hon. J. Earl Major, Chief Judge.

Hon. F. Ryan Duffy, Circuit Judge.

Hon. Walter C. Lindley, Circuit Judge.

The United States of America;
Plaintiff-Appellee,

10327

*vs.*Munio Knoll,
Defendant-Appellant.} Appeal from the
United States Dis-
trict Court for the
Northern District
of Illinois, Eastern
Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Thursday, January 3, 1952.

Before:

Hon. J. Earl Major, Chief Judge.

Hon. F. Ryan Duffy, Circuit Judge.

Hon. Walter C. Lindley, Circuit Judge.

| | | |
|-------|---|--|
| 10328 | The United States of America, <i>Plaintiff-Appellee,</i> | } Appeal from the United States Dis- trict Court for the Northern District of Illinois, Eastern Division. |
| | <i>vs.</i> | |
| | Regina Teitler, <i>Defendant-Appellant.</i> | |

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed.

And afterwards, to-wit, on the eighteenth day of January, 1952, there was filed in the office of the Clerk of this Court a petition for rehearing which said petition for rehearing is not copied herein.

And afterwards, to-wit, on the twentieth day of February, 1952, there was filed in the office of the Clerk of this Court an answer to the petition for rehearing which said answer is not copied herein.

And afterwards, to-wit, on the sixteenth day of April, 1952, there was filed in the office of the Clerk of this Court the opinion of the Court on the Petition for Rehearing which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

October Term, 1951, January Session, 1952.

10326 The United States of America,
Plaintiff-Appellee.
vs.
Marcel Max Lutwak,
Defendant-Appellant.

10327 The United States of America,
Plaintiff-Appellee,
vs.
Munio Knoll,
Defendant-Appellant.

10328 The United States of America,
Plaintiff-Appellee,
vs.
Regina Treitler,
Defendant-Appellant.

Appeals from the
United States Dis-
trict Court for the
Northern District
of Illinois, Eastern
Division.

Upon petition for
Rehearing.

April 16, 1952.

Before MAJOR, *Chief Judge*, DUFFY and LINDLEY, *Circuit Judges.*

Per Curiam.

The statements contained in the last three lines of the second paragraph of appellant's petition for rehearing, beginning with the words "In ignoring * * *" and the footnote 1 on the same page, together with the general tenor of the petition, might well justify striking the entire document

for inexcusable impertinence and irrelevance. Clearly the matter mentioned in those two excerpts is in no way related to the facts or the law of this case. What the court may have done in matters involving other issues of fact and other principles of law, foreign to anything involved here, is no concern of appellants or their counsel. Presumably if the court has erred in some other case, counsel for the parties thereto will not fail to direct our attention to our miscomings.

However, rather than strike the petition, we prefer to indulge the belief that the matter, rather than being intentionally objectionable, was the result of the unrestrained ardor of a zealous advocate; instead of striking the petition, we direct the Clerk to delete therefrom the matter mentioned.

The petition for rehearing thus corrected really amounts to an unrestrained berating of the court for its failure to adopt defendants' theories advanced at the trial and in the argument in this court. It is in essence merely a reargument of everything previously presented. However, the argument that the alleged wives were incompetent is renewed with such vigor and is of such importance in the law of evidence that we have thought it advisable to enlarge upon what we said with respect to this issue. Accordingly the paragraph on page 8 of our opinion beginning "Defendants assert error * * *" and the paragraph following are stricken from the opinion and substituted therefor as a supplement to our decision is the following.

Maria Knoll, or Romankiewicz or Lutwak, originally married to Munio Knoll, and later, ostensibly, to Lutwak, testified for the government. Munio interposed no objection to her competency. Lutwak objected to her testimony as to what occurred after the second alleged marriage, *i. e.*, that to him, Lutwak, in August 1947. Grace Klemtner, allegedly married to Leopold, also testified. Leopold preserved an objection, but, inasmuch as he was acquitted, the question as to her privilege or competency as against him has become moot. She was unquestionably competent as to all other parties. Bess Osborne, who went through a marriage ceremony with Munio Knoll in Paris, was the other alleged spouse called to testify for the government. Munio objected upon the ground that she was his wife, though the record showed that he had previously married Maria. Other parties not related to her objected on the same ground. How-

ever, the privilege of the alleged husband does not extend to others.

Our real question then is: Did the court properly admit the testimony of Maria against Lutwak, and the testimony of Bess against Munio? There is no statute or Supreme Court decision declaring this testimony privileged or incompetent. Its legal status can best be understood from a somewhat detailed examination of authoritative decisions.

In *Funk v. United States*, 290 U. S. 371, the Supreme Court after reviewing certain earlier cases, held the wife of the defendant on trial for a criminal offense to be a competent witness in his behalf. Whether she could properly have been called to testify against him was not presented or decided. In the course of its decision, the court quoted from *Benson v. United States*, 146 U. S. 325: "the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. * * * Today the tendency is to enlarge the domain of competency and to submit to the jury for their consideration as to the credibility of the witness those matters which heretofore were ruled sufficient to justify his exclusion. This change has been wrought partially by legislation and partially by judicial construction. * * * steadily, one by one, the merely technical barriers which excluded witnesses from the stand have been removed, till now it is generally * * * true that no one is excluded therefrom unless the lips of the originally adverse party are closed by death, or unless some one of those peculiarly confidential relations, like that of husband and wife, forbids the breaking of silence."

The court also quoted from *Rosen v. United States*, 245 U. S. 467 as follows: "In the * * * which have elapsed since the decision of the *Benson* case, the disposition of courts and of legislative bodies to remove disabilities from witnesses has continued, as that decision shows it had been going forward before, under dominance of the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent. * * * Satisfied as we are that the legislation and the very great weight of judicial authority which have developed in sup-

port of this modern rule, * * * proceed upon sound principle, we conclude that the dead hand of the common-law rule of 1789 should no longer be applied to such cases as we have here."

The Supreme Court continued: "The rules of the common law which disqualified as witnesses persons having an interest, long since, in the main, have been abolished both in England and in this country; and what was once regarded as a sufficient ground for excluding the testimony of such persons altogether has come to be uniformly and more sensibly regarded as affecting the credit of the witness only. * * * Nor can the exclusion of the wife's testimony, in the face of the broad and liberal extension of the rules in respect of the competency of witnesses generally, be any longer justified, if it ever was justified, on any ground of public policy. It has been said that to admit such testimony is against public policy because it would endanger the harmony and confidence of marital relations, and, moreover, would subject the witness to the temptation to commit perjury. Modern legislation, in making either spouse competent to testify in behalf of the other in criminal cases, has definitely rejected these notions, and in the light of such legislation and of modern thought they seem to be altogether fanciful. The public policy of one generation may not, under changed conditions, be the public policy of another. *Patton v. United States*, 281 U. S. 276, 306.

"The fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth. And since experience is of all teachers the most dependable, and since experience also is a continuous process, it follows that a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule.

"It may be said that the court should continue to enforce the old rule, however contrary to modern experience and thought, and however opposed, in principle, to the general current of legislation and of judicial opinion, it may have become, leaving to Congress the responsibility of changing it. Of course, Congress has that power; but if Congress fail to act, as it has failed in respect of the matter now under review, and the court be called upon to decide the question, is it not the duty of the court, if it possess the power, to decide it in accordance with present day standards

of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past? That this court has the power to do so is necessarily implicit in the opinions delivered in deciding the *Benson* and *Rosen* cases. * * * The rule of the common law which denies the competency of one spouse to testify in behalf of the other in a criminal prosecution has not been modified by congressional legislation. * * * That this court and the other federal courts, in this situation and by right of their own powers, may decline to enforce the ancient rule of the common law under conditions as they now exist we think is not fairly open to doubt."

Following this decision, Rule 26 of the Federal Rules of Criminal Procedure was adopted, 18 U. S. C. 254, providing that "The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." It is clear that the language of the rule sprang from the decisions of the Supreme Court in the *Funk* case and in *Wolfe v. U. S.*, 291 U. S. 7, 12.

In 1935 there arose before the Court of Appeals for the 10th Circuit the question of the admissibility of the testimony of a wife against her husband in a criminal prosecution of the latter. The court said: "From the dawn of the common law until the middle of the nineteenth century, the accused could not testify in his own behalf because of his interest in the event of the trial. * * * The accused is now a competent witness in his own behalf in every state save possibly one.

"By similar statutes every state but one permits a wife or husband to testify when the other is accused, sometimes only in his behalf or with his or her consent. * * * Congress passed no statute removing the bar as to her, but as has been seen the ancient rule was abrogated by judicial decision. A wife is now competent to testify for her accused husband; the question still remains, May she testify against him? In this case, she was divorced when she testified, and there may well be a distinction on that ground. We prefer, however, to rest our decision on the underlying question, whether a wife is incompetent as a witness when called by the prosecution.

"The accused himself, by the federal constitution and the constitution or laws of the states, may not be compelled to testify upon his own trial. Should that immunity extend to

his wife? The enlightenment of the times which requires modification of common law principles may be found in the informed judgment of legislatures or the courts. *Funk v. United States*, supra. * * *

"These statutes, and the decisions of many courts which might be cited, indicate a clear and decided trend toward removing the bar of incompetency from witnesses as such; that we are moving steadily in the direction of allowing the trier of the facts to hear all the evidence, the interest or relationship of the witness to the parties being given due consideration in weighing its value. The trend is in the right direction." *Yoder v. United States*, 80 F. 2d 665.

In *United States v. Walker*, 176 F. 2d 564 c.d. 338 U. S. 891, Judge Learned Hand, writing for the majority, said: "In *Yoder v. United States* the Tenth Circuit declared that, like her incompetence to testify in her husband's behalf, a wife's incompetence to testify against him had become obsolete and should be abolished. * * * A few months later the Third Circuit held the contrary of this dictum, and the Sixth Circuit made the same ruling only a year ago. Thus, the question is still open in point of authority." He proceeded: "It is always a debatable question how far any relevant evidence should be privileged. It deprives the party against whom the privilege is invoked of access to the truth; and a disclosure of the whole truth should be the prime concern of a court of justice. Whether in a given situation the interest of the privileged party in suppressing the truth, ought to outweigh that concern would seem to be a matter for Congress, and not for the courts. * * * We conclude therefore that we should await the choice of Congress between the conflicting interests involved, or such an overwhelming general acceptance by the states of abolition of the privilege, as induced the Supreme Court to action in *Funk v. United States*, supra."

Judge Clark, dissented; saying: "Admittedly the common-law principle that 'a wife cannot be produced either for or against her husband, * * *' is gone; indeed, there is none now so poor as to do it reverence. But I think we tend to overlook the fact that our duty to interpret 'the principles of the common law' in the light of 'reason and experience,' Federal Rules of Criminal Procedure, rule 26, compels us to discover anew a rational rule, and that a rule looking at least halfway toward the past is itself a new embodiment of the law without, however, the gain of being a real adjustment to modern life. In this instance, there-

fore, I prefer the forthright approach of a great American judge, McDermott, J., speaking for a unanimous court in *Yoder v. United States*, 10 Cir., 80 F. 2d 665, and placing his decision by preference on this very point."

"I think that the judge's ruling below, made after careful hearing and argument, faced modern realities in the spirit invoked in *Funk v. United States*, 290 U. S. 371, 54 S. Ct. 212, 78 L. Ed. 369, 93 A. L. R. 1136, and now embodied as a mandate in F. R. Cr. P. 26." He added this footnote: "Approved by those courts of last resort, the law reviews: 24 Calif. L. Rev. 472; 4 Duke B. A. J. 107; 35 Mich. L. Rev. 329; 20 Minn. L. Rev. 693; 10 So. Calif. L. Rev. 94. See also Hutchins & Slesinger, Some Reflections on the Law of Evidence; Family Relations, 13 Minn. L. Rev. 675."

In *Shores v. United States*, 174 F. 2d 838 (CA-8), concerning various decisions, the court said: "All these accordant decisions were precedent of the emancipating declaration made by the Supreme Court in 1933, in *Funk v. United States*, 290 U. S. 371, 54 S. Ct. 212, 78 L. Ed. 363, 93 A. L. R. 1136, that the federal courts were not to regard themselves as being fettered by the limitations of the criminal evidence rules of the common law as they might have existed at some particular time; that in the initial adoption of common law rules for the federal judicial system there equally was intended to be an adoption of those principles of extension and growth which always had been regarded as being inherent in the common law system and which in fact constituted the genius of that system; * * * that the courts at all times, in the application of any rule of evidence, should give heed to the general currents of legal thought, judicial opinion, and legislative action in the particular field; and that they should continuously 'declare and effectuate, upon common-law principles, what is the present rule upon a given subject in the light of fundamentally altered conditions' and on the basis of 'present day standards of wisdom and justice.' 290 U. S. at pages 383 and 384, 54 S. Ct. at page 216, 78 L. Ed. 363, 93 A. L. R. 1136."

"Mr. Justice (later Chief Justice) Stone restated the doctrine of the *Funk* case in *Wolfe v. United States*, 291 U. S. 7, 12, 54 S. Ct. 279, 78 L. Ed. 617, decided at the same term, in the terse language, that rules of criminal evidence should be 'governed by common-law principles as interpreted and applied by the federal courts in the light of reason and experience.' This language was incorporated into Rule 26 of the subsequently promulgated Federal Rules

of Criminal Procedure, 18 U. S. C. * * * The Notes of the Advisory Committee added the following: 'This rule contemplates the development of a uniform body of rules of evidence to be applicable in trials of criminal cases in Federal courts. * * * The rule does not fetter the applicable law of evidence to that originally existed at common law. It is contemplated that the law may be modified and adjusted from time to time by judicial decisions.'

"Since the liberating mandate of the *Funk* case, all the decisions in which the question here involved has arisen have held that under present-day concept of the common law exception to the incompetency of a wife's testimony against her husband, his transportation of her in interstate commerce for the purpose of having her engage in prostitution is such a personal wrong against her as to make her testimony admissible in a prosecution of him under the Mann Act. See *United States v. Mitchell*, 2 Cir., 137 F. 2d 1006, reaffirmed 138 F. 2d 831, certiorari denied 321 U. S. 794, 64 S. Ct. 785, 88 L. Ed. 108, rehearing denied 322 U. S. 768, 64 S. Ct. 1052, 88 L. Ed. 1594; *United States v. Williams*, D. C. Minn., 55 F. Supp. 375; *Levine v. United States*, 5 Cir., 163 F. 2d 992; *Hayes v. United States*, 10 Cir., 168 F. 2d 996. Cf. also *Wilhoit v. Hiatt*, D. C. Pa. 60 F. Supp. 664.

"*Yoder v. United States*, 10 Cir., 80 F. 2d 665, undertook to go even further and to declare generally that a wife's testimony may be received against her husband in a criminal case of any nature, subject only to the incompetency of any communications made within the field of marital privilege, where that privilege is asserted. *Thouvenell v. Zerbst*, 10 Cir., 83 F. 2d 1003, approved and repeated this broad view.

* * * The American Law Institute's Model Code of Evidence, however, like the *Yoder* case, permits a privilege to be claimed against a wife's testimony only as to confidential communications of the marital relationship. * * * The right under the common law rule, of an accused not to have his spouse testify against him, and the equal right of such spouse to refuse to do so were privileges created by and having their existence only within the scope of the rule itself. * * * The public policy involved, under which it was deemed of more importance to leave the wife's testimony available in the class of offenses encompassed by the exception, than to cloak it with the privilege of the rule, necessarily had as its underlying basis the interest of society generally, and not simply that of the wife individually,

In *United States v. Graham*, 87 F. Supp. 237, defendant was indicted for having transported into the state \$5,000 in money theretofore stolen or taken feloniously by fraud in violation of Section 415, now 2314 Title 18 U. S. C. In prosecuting him, the government called his wife to testify, that the money had been stolen from her. The defendant urged that she was incompetent. The court, after thorough examination of the historical background of the common law and the statutory law affecting women and women's rights and their position as witnesses, made various pertinent comments. Thus it said at 239: "The adoption of the Federal Rules of Criminal Procedure marked an important step in a lengthy struggle to improve the administration of criminal justice through judicial rule making. * * * By statute many of the states have gradually abolished restrictions as to the competency of spouses to testify against each other. See Wigmore on Evidence, 3rd Ed., Sec. 488. Many of these statutes are lacking in uniformity and it is difficult to state any general rule with respect to them. * * *

"It is agreed by some legal writers that the rule prohibiting husband and wife from testifying against each other has long outlived its usefulness and that in the interests of justice, the court should be permitted to hear all of the evidence. Wigmore states it thus: 'This privilege has no longer any good reason for retention. In an age which has so far rationalized, depolarized and de-chivalrized the marital relation and the spirit of Femininity as to be willing to enact complete legal and political equality and independence of men and women, this marital privilege is the merest anachronism, in legal theory, and an indefensible obstruction to truth, in practice.' 3rd Ed., Vol. 8, Sec. 2228, p. 232."

We have quoted at length from the decisions, in the hope of demonstrating that in a case such as this, the rules of evidence, as defined in Rule 26, have shown an increasing tendency toward abolishment of incompetency in favor of admissibility, leaving the interest of the witness to the trier of the facts as bearing upon credibility. In other words, under the modern trend of thought in this country, the spouse, instead of being incompetent, is to be admitted as an interested witness, whose credibility is for the jury. This conclusion, we think, is the only one consistent with the reasoning of the Supreme Court in the decisions quoted and that of other courts. We conclude that, in view of the fact

that Rule 26 of the Federal Rules of Criminal Procedure provides that the admissibility of evidence and the competence and privileges of witnesses shall be governed, in the absence of an act of Congress, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience, and in view of the reasoning of the Supreme Court and other courts, we are justified in holding that, irrespective of all other questions, the wives were competent witnesses.

If we be wrong in this conclusion, then we think that, for another reason, the condition of the record here was such that the court was justified in permitting them to testify. A substantial part of the government's case had been submitted before any question of competency arose. The court obviously believed that a prima facie case of invalidity of the marriages had been presented. In such a situation it seems to us only reasonable that the court should conclude, that, in view of the prima facie case of invalidity, the jury should hear what the wives had to say and make the final determination of fact. This rule we think is in accord with authoritative decisions.

Thus in *Hoch v. The People of the State of Illinois*, 219 Ill. 265, the court held: In determining the competency of an alleged wife as a witness the court must act upon the evidence as presented at the time of the ruling, and if there is evidence establishing a former marriage of the accused and that the first wife is still living and undivorced it is not error to permit the wife of the bigamous marriage to testify, but all questions of fact as to either marriage must be left to the ultimate determination of the jury, under proper instructions. In *Clark, alias French v. The People*, 178 Ill. 37 at 38, the court held that: The law is that where parties enter into a marriage contract and one of them has at the time a living spouse from whom he or she has not been legally divorced, the marriage is, as to the other, absolutely void. (*Cartwright v. McGown*, 121 Ill. 388.) Where the supposed marriage is void the alleged husband and wife are competent witnesses for or against each other, even though they believe themselves to be lawfully married. The admission of evidence should as far as possible lie in the discretion of the trial judge. *Klein v. United States*, 176 F. 2d 184 (CA-8), c. d. 338 U. S. 870; *United States v. Riccardi*, 174 F. 2d 883 (CA-3), c. d. 337 U. S. 941; *United States v. Gottfried, et al.*, 165 F. 2d 360 (CA-2), c. d. 333 U. S. 860; *Oliver v. U. S.*, 267 F. 544 (CA-4).

It is difficult to follow defendants' reasoning as to alleged validity of the marriages under French law. Under Illinois law, and quite generally in this country, a sham marriage, one in jest, or one intended to be only a pretense is void. In the absence of proof to the contrary, the marriage laws of another state or country are presumed to be the same as the laws obtaining in the forum, there is no presumption that the marriage laws of another state or country are different from the laws obtaining in the forum. *Lincoln v. Riley*, 217 Ill. App. 571; *Finer v. Steuer*, 152 N. E. 220, 255 Mass. 611; *Juilliard & Co. v. May*, 130 Ill. 87 at 97; *Nehring v. Nehring*, 164 Ill. App. 527 at 530. Thus it was held that the laws of the Argentine Republic relating to the purchase of a draft are presumably in accord with the law merchant as recognized in New York. *Scura v. National City Bank of New York*, 177 N. Y. S. 75, 107 Misc. 93. There is no presumption that the law of foreign countries is unlike ours. *The Fort Gaines*, D. C. Md., 18 F. 2d 413, 414; *The Hoxie*, C. C. A. Md., 297 F. 189, 190 (CA-4), affirming D. C. 291 F. 599; certiorari denied; *American Exp. Co. v. U. S.*, 45 S. Ct. 91, 266 U. S. 608, 69 L. Ed. 465; *Royal League v. Kavanagh*, 233 Ill. 175.

If the French law differs from that of Illinois and the United States, it was defendants' duty to show that fact and thus rebut the presumption that it was the same. In *Pierce, Admr. et al. v. Pierce*, 379 Ill. 185 at 191, the court said: "The general rule of conflict of laws is that the marital status is governed by the law of the State of domicile. *Longhran v. Longhran*, 292 U. S. 216, 54 Sup. Ct. 684; *People v. Shaw*, 239 Ill. 544; 35 Am. Jr. (Marriage) 286, par. 170." In the absence of rebuttal evidence to the contrary then, the marriages were void under the French law.

The petition for rehearing is denied.

And on the same day, to-wit, on the sixteenth day of April, 1952, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS
For the Seventh Circuit,
Chicago 19, Illinois.

Wednesday, April 16, 1952.

Before:

Hon. J. Earl Major, Chief Judge.
Hon. F. Ryan Duffy, Circuit Judge.
Hon. Walter C. Lindley, Circuit Judge.

10326 The United States of America,
Plaintiff-Appellee,
vs.
Marcel Max Lutwak,
Defendant-Appellant.

10327 The United States of America,
Plaintiff-Appellee,
vs.
Munio Knoll,
Defendant-Appellant.

Appeals from the
United States Dis-
trict Court for the
Northern District
of Illinois, East-
ern Division.

10328 The United States of America,
Plaintiff-Appellee,
vs.
Regina Treitler,
Defendant-Appellant.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, Denied.

It is further ordered that the Clerk of this Court be directed to delete from the Petition for Rehearing filed by Defendants-Appellants the matter contained in the last three lines of the second paragraph beginning with the words "In ignoring * * *" and the footnote 1 on the same page.

And, afterwards, to-wit, on the twenty-second day of April, 1952, the mandates of this Court issued to the United States District Court for the Northern District of Illinois, Eastern Division.

And afterwards, to-wit, on the twenty-third day of April, 1952, the following further proceedings were had and entered of record, to-wit:

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Wednesday, April 23, 1952.

Before:

Hon. J. Earl Major, Chief Judge.

The United States of America,
10326. *Plaintiff-Appellee,*
vs.

Marcel Max Lutwak,
Defendant-Appellant.

The United States of America,
10327. *Plaintiff-Appellee,*
vs.

Munio Knoll,
Defendant-Appellant.

The United States of America,
10328. *Plaintiff-Appellee,*
vs.

Regina Treitler,
Defendant-Appellant.

Appeals from the
United States Dis-
trict Court for the
Northern District
of Illinois, East-
ern Division.

On motion of counsel for Defendants-Appellants, not objected to by counsel for Plaintiff-Appellee, it is ordered that the mandate of this Court heretofore issued to the United States District Court for the Northern District of Illinois, Eastern Division on April 22, 1952 be, and the same is hereby, Recalled and Stayed until May 16, 1952, subject to the provisions of Rule 25 of the Rules of this Court.

It is further ordered that the order heretofore entered on April 22, 1952, directing Defendants-Appellants to surrender, be vacated and set aside and that the said Defendants-Appellants' bail bonds posted with this Court be continued in force upon the same terms and conditions as were heretofore in effect.

And afterwards, to-wit, on the twenty-ninth day of April, 1952, there was filed in the office of the Clerk of this Court a designation of record, which designation of record is in the words and figures following, to-wit:

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

The United States of America,
Plaintiff-Appellee,
vs.
Marcel Max Lutwak,
Defendant-Appellant. } No. 10,326.

The United States of America,
Plaintiff-Appellee,
vs.
Munio Knoll,
Defendant-Appellant. } No. 10,327.

The United States of America,
Plaintiff-Appellee,
vs.
Regina Treitler,
Defendant-Appellant. } No. 10,328.

NOTICE.

To: Otto Kerner, Jr., United States Attorney, United States Court House, Chicago, Illinois.

You Are Hereby Notified that we shall, on Tuesday, April 29, file with the Clerk of the above court, the Amended Designation of Record of Defendants-Appellants, to be filed in the Supreme Court of the United States, copies of which Designation of Record are hereby served upon you.

A. Bradley Eben,
Richard F. Watt,
Bernard Weissbourd.

Received a copy of the above Notice, together with a copy of the Designation of Record therein referred to, this _____ day of April, 1952.

Otto Kerner, Jr.,
United States Attorney.

Endorsed: Filed Apr. 29, 1952. Kenneth J. Carrick,
Clerk.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

The United States of America,
Plaintiff-Appellee,
vs.
Marcel Max Lutwak,
Defendant-Appellant. } No. 10,326.

The United States of America,
Plaintiff-Appellee,
vs.
Munio Knoll,
Defendant-Appellant. } No. 10,327.

The United States of America,
Plaintiff-Appellee,
vs.
Regina Treitler,
Defendant-Appellant. } No. 10,328.

DESIGNATION OF RECORD.

To the Clerk of the United States Court of Appeals for the Seventh Circuit:

The Clerk will please prepare a Certified Transcript of Record in these causes for filing in the Supreme Court of the United States to consist of the following:

1. The entire printed record in this Court of Appeals.
2. Order taking this cause under advisement entered December 5, 1951.
3. Opinion of this Court, filed January 3, 1952.
4. The judgment entered January 3, 1952.
5. Reference to filing of petition for rehearing.
6. Reference to filing of answer to petition for rehearing.
7. Supplemental Opinion of this Court filed April 16, 1952.
8. Order denying petition for rehearing entered April 16, 1952.

9. Order of this Court recalling and staying mandate, entered April 23, 1952.

10. This Amended Designation of Record, Notice of Filing thereof and Proof of Service in connection therewith.

11. Clerk's Certificate.

By A. Bradley Ehen,
208 South LaSalle Street.

Richard F. Watt,
1943—141 W. Jackson Blvd.

Bernard Weissbourd,
2025—135 S. LaSalle Street.

Endorsed: Filed April 29, 1952. Kenneth J. Carrick,
Clerk.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the papers filed and the proceedings had, made in accordance with the designation of record, filed April 29, 1952, in:

Cause No. 10326.

The United States of America,

Plaintiff-Appellee,

vs.

Marcel Max Lutwak,

Defendant-Appellant.

Cause No. 10327.

The United States of America,

Plaintiff-Appellee;

vs.

Munio Knoll,

Defendant-Appellant.

Cause No. 10328.

The United States of America,

Plaintiff-Appellee,

vs.

Regina Treitler,

Defendant-Appellant,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit:

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 2nd day of May, A. D. 1952.

(Seal)

Kenneth J. Carrick,
*Clerk of the United States Court of
Appeals for the Seventh Circuit.*

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 66

MARCEL MAX LUTWAK, MUNIO KNOLL, and REGINA TREITLER,
Petitioners,

vs.


THE UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—Filed October 13, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(4493)



Office - Supreme Court, U.

FILED

MAY 16 1952

LIBRARY
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. ~~100~~ 66

MARCEL MAX LUTWAK, MUNIO KNOLL, AND
REGINA TREITLER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT.**

ANTHONY BRADLEY EBEN,
RICHARD F. WATT,
BERNARD WEISSBOURD,

Counsel for Petitioners.

JOSEPH L. NELLIS,
DUNNING, NELLIS & LUNDIN,
-Of Counsel.

| | PAGE |
|------------------------------------|------|
| Opinions below..... | 2 |
| Jurisdiction | 2 |
| Questions presented..... | 2 |
| Statutes involved..... | 3 |
| Statement | 5 |
| Reasons for granting the writ..... | 9 |
| Conclusion | 23 |

CITATIONS.

Cases:

| | |
|--|-------|
| Bassett v. United States (1890), 137 U. S. 496..... | 14 |
| Brunner v. United States (C. A. 6th, 1948), 168 F. (2d) 281 | 15 |
| Cangelosi v. United States (C. A. 6th, 1927), 19 F. (2d) 923 | 22 |
| Church v. Hubbard (1804), 2 Cranch. 287..... | 20 |
| Clark v. United States (C. A. 5th, 1932), 61 F. (2d) 409 | 12 |
| Commissioner v. Hyde (C. A. 2d, 1936), 82 F. (2d) 174 | 20 |
| Commonwealth v. Stevens (1907), 196 Mass. 280..... | 23 |
| Cosulich Societa Triestina Di Navigazione v. Elting (C. A. 2d, 1933), 66 F. (2d) 534..... | 20 |
| Cuba R. Co. v. Crosby (1912), 222 U. S. 473..... | 19 |
| Dowdy v. United States (C. A. 4th, 1931), 46 F. (2d) 417 | 12 |
| Duncan v. United States (C. A. 7th, 1928), 23 F. (2d) 3 | 22 |
| Ezzard v. United States (C. A. 8th, 1925), 7 F. (2d) 808 | 22 |
| Fiswick v. United States (1946), 329 U. S. 211..... | 9, 11 |

| | |
|--|------------|
| Franzen v. E. I. DuPont de Nemours & Co. (C. A. 3d, 1944), 146 F. (2d) 835..... | 19 |
| Funk v. United States (1933), 290 U. S. 371..... | 15, 16 |
| Gordon v. Commissioner (C. A. 9th, 1935), 75 F. (2d) 829..... | 21 |
| E. Geli & Co. v. Cunard S. S. Co. (C. A. 2d, 1931), 48 F. (2d) 115..... | 21 |
| Griffin v. United States (1949), 336 U. S. 705..... | 14, 15 |
| Helvering v. Gowran (1937), 302 U. S. 238..... | 13 |
| Holt v. United States (C. A. 4th, 1937), 94 F. (2d) 90..... | 12 |
| Krulewitch v. United States (1949), 336 U. S. 440..... | 10, 11, 13 |
| Lilienthal v. United States (1878), 97 U. S. 237..... | 22 |
| Lincoln v. Riley (1920), 217 Ill. App. 571..... | 19 |
| Logan v. United States (1892), 144 U. S. 263..... | 11 |
| Miles v. United States (1881), 103 U. S. 304..... | 14 |
| Mora v. United States (C. A. 5th, 1951), 190 F. (2d) 749..... | 12 |
| Ozanic v. United States (C. A. 2d, 1939), 165 F. (2d) 738..... | 20 |
| Paul v. United States (C. A. 3d, 1935), 79 F. (2d) 561..... | 15 |
| J. E. Riley Inv. Co. v. Commissioner (1940), 311 U. S. 55..... | 13 |
| State v. Henneman (1936), 40 N. M. 166, 56 P. 2d 1130..... | 23 |
| Tofanelli v. United States (C. A. 9th, 1928), 28 F. (2d) 580..... | 12 |
| Toshiko Inaba v. Nagle (C. A. 9th, 1929), 36 F. (2d) 481..... | 19 |
| United States v. Blau (1951), 340 U. S. 332..... | 14 |
| United States ex rel. Jelic v. District Director (C. A. 2d, 1939), 106 F. (2d) 14..... | 2 |
| United States v. Hall (C. A. 2d, 1950), 178 F. (2d) 853..... | 1 |
| United States v. Krulewitch (C. A. 2d, 1948), 167 F. (2d) 943..... | 1 |

United States v. Rubenstein (C. A. 2d, 1945), 151 F.
(2d) 915.....9, 19

United States v. Vigorito (C. A. 2d, 1933), 67 F. (2d)
329 22

United States v. Walker (C. A. 2d, 1949), 176 F. (2d)
56415, 16

United States v. Wiggins (1840), 39 U. S. 334..... 20

Yoder v. United States (C. A. 10th, 1935), 80 F. (2d)
665.....15, 16

Statutes:

Title 8, U. S. C. § 180a..... 3, 5

Title 8, U. S. C. § 220(c)..... 3, 5

Title 8, U. S. C. § 232.....4, 5, 6

Title 18, U. S. C. § 88..... 4, 5

(the revised Criminal Code provision is 18 U. S. C.
§ 371 (1948))

Miscellaneous:

Rule 26, Fed. Rules Criminal Procedure.....14, 17; 24

Annotation, 11 A. L. R. 2d 646 (1949).....16, 17

IN THE
Supreme Court of the United States

OCTOBER TERM, 1951.

No. _____

MARCEL MAX LUTWAK, MUNIO KNOLL, AND
REGINA TREITLER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT.**

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Marcel Max Lutwak, Munio Knoll, and Regina Treitler, defendants below, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on January 3, 1952. The Court of Appeals affirmed the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, finding the Petitioners guilty of a charge of conspiracy to violate Sections 180a and 220(c), Title 8, U. S. Code. A petition for rehearing was filed by Petitioners in the Court of Appeals on January 18, 1952; it was denied in a supplemental opinion of that Court on April 16, 1952.

OPINIONS BELOW.

The original opinion of the Court of Appeals for the Seventh Circuit, dated January 3, 1952, and its supplemental opinion, dated April 16, 1952, are both as yet unreported (R. 391-400 and 404-14).

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1254 (1) (62 Stat. 928).

QUESTIONS PRESENTED.

1. Are wives competent to testify against their husbands in a federal criminal case involving no personal wrong to the wives?
2. Is it proper for the wives of defendants in a federal criminal case, although presumed to be *prima facie* incompetent as witnesses, to testify as to the very facts necessary to establish their competency, when those facts constitute a major portion of the evidence with respect to the principal issue to be determined by the jury?
3. Are the acts and declarations of a conspirator after the termination of a conspiracy and not in furtherance of it admissible against absent co-conspirators on the question of their intent to conspire?
4. In a federal criminal case, in which the government

is seeking to establish the invalidity of marriages contracted in a foreign country, is not the burden upon the government to prove such invalidity under the applicable foreign law, and does not that burden require the government to prove the foreign law?

5. Where two marriages are shown, is it not the presumption that the second marriage is valid, and is not the burden on the party attacking such second marriage to overcome the presumption that the first marriage was dissolved? Is not an instruction which fails to indicate to the jury that there is a presumption in favor of the second marriage erroneous?

STATUTES INVOLVED.

Title 8, U. S. C., Section 180a:

Any alien who after March 4, 1929, enters the United States at any time or place other than as designated by immigration officials or eludes examination or inspection by immigration officials, or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall be guilty of a misdemeanor and, upon conviction, shall be punished by imprisonment for not more than one year or by a fine of not more than \$1,000, or by both such fine and imprisonment.

Title 8, U. S. C., Section 220(c):

Whoever knowingly makes under oath any false statement in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, shall, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both.

Title 18, U. S. C., Section 88 (the revised Criminal Code provision is 18 U. S. C., Section 371 (1948)):

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both.

Title 8, U. S. C., Section 232:

Notwithstanding any of the several clauses of section 136 of this title, excluding physically and mentally defective aliens, and notwithstanding the documentary requirements of any of the immigration laws or regulations, Executive orders, or Presidential proclamations issued thereunder, alien spouses or alien children of United States citizens serving in, or having an honorable discharge certificate from the armed forces of the United States during the Second World War shall, if otherwise admissible under the immigration laws and if application for admission is made within three years of December 28, 1945, be admitted to the United States. * * *

STATEMENT.

Petitioners were convicted by a jury sitting for the United States District Court for the Northern District of Illinois, Eastern Division, upon an indictment which charged them with conspiring (1) to commit certain offenses set forth in five substantive counts, and (2) to defraud the United States of and concerning its governmental function and right to administer the immigration laws and the Immigration and Naturalization Service of the Department of Justice, in violation of Title 18, U. S. Code, Section 88 (R. 4-9).

The five substantive counts charged Petitioners with securing the illegal entry under the War Brides Act (Title 8, U. S. C., Section 232) at the Port of New York of three aliens (including the Petitioner Munio Knoll), by means of false and misleading representations and the concealment of material facts with respect to the marital status of the aliens, in violation of Title 8, U. S. Code, Section 180a, and with making false statements under oath concerning such marital status in applications required by the immigration laws of the United States, in violation of Title 8, U. S. Code, Section 220(c) (R. 9-14). In effect, the indictment charged that the Petitioners had arranged "ostensible" marriages between discharged veterans and aliens for the purpose of securing the entry of the aliens into the United States under the War Brides Act.

At the conclusion of the government's case, Petitioners moved for acquittal on the substantive counts (R. 288), and all five counts were dismissed by the trial court on the ground that proper venue as to them had not been proved (R. 290-91).

Petitioners perfected appeals to the Court of Appeals for the Seventh Circuit on the grounds, among others, that (1) the trial court had erred in admitting into evidence acts and declarations of co-conspirators occurring after the alleged conspiracy had terminated and not in furtherance of it; (2) the wife of a defendant in a criminal case is incompetent to testify against him; and (3) the validity of the marriages by which entry of the aliens was accomplished under the War Brides Act ought be determined according to the law of the country where the marriages took place, namely, France; since the government failed to prove that under French law the marriages were invalid, there was failure of proof with respect to a vital element of the government's case.

The Court of Appeals affirmed the convictions, and in so doing it did not dispute the essential facts upon which Petitioners rested the above contentions. Rather the Court below rejected Petitioners' arguments as to the law applicable to those facts, and in its two opinions stated a variety of reasons for doing so. The original opinion of the Court below is set out at R. 391-400; the opinion denying the petition for rehearing, at R. 404-14.

With regard to Petitioners' first argument, the Court below, in its first opinion, took the position that the acts and declarations of a conspirator after the termination of the conspiracy and not in furtherance of it are admissible against absent co-conspirators on the question of their intent to enter into and carry out the conspiracy (R. 399). This ruling remained unchanged in the second opinion of the Court below.

With regard to Petitioners' second contention, the Court below seemed to agree, in its first opinion, that wives in a criminal case are incompetent to testify against their husbands (R. 397), but concluded that since the validity

of the marriages was contested and was therefore a question of fact for the jury, and since the jury by its verdict resolved that question by finding the marriages invalid, there were in fact no marriages and hence the rule as to the incompetency of wives did not arise. In their Petition for Rehearing, as well as in their original Brief, Petitioners pointed out to the Court of Appeals that such a ruling permitted the jury to become judges; not only of the contested question of fact relating to the validity of the marriages, but also of the question of law relating to the competency of the wives as witnesses. In addition, the Petitioners argued that this ruling permitted the trial court to invade the province of the jury, for, by permitting the wives to testify, the court in effect was ruling upon the ultimate question which the jury had to decide, namely, the validity of the marriages. In its second opinion, the Court below shifted its ground and held directly that wives, under the modern trend of judicial thought, are competent in criminal cases to testify against their husbands (405-13).

With regard to Petitioners' third argument, the Court below held, in its first opinion, that a sham marriage, void under the law of this country as against public policy, has no validity, regardless of what the law may have been where contracted (R. 396). The Petition for Rehearing pointed out that a marriage valid where celebrated is valid everywhere, unless it is contrary to the laws of nature or is declared by positive law to be void, and that with respect to the marriages involved here no law of nature and no positive law had been violated. In fact, it was pointed out to the Court below that the majority rule gave validity to a marriage entered into for the purpose of accomplishing some definite extra-marital object but pursuant to an understanding that subsequently the parties would go their separate ways. In its second opinion, the Court be-

low again shifted its ground, holding that in the absence of proof the marriage laws of a foreign country are presumed to be the same as those of the forum, since there is no presumption that they are different. The Court ruled, therefore, that since the Petitioners had not rebutted the presumption that French law was the same as Illinois law, and since under Illinois law the marriages were void, the marriages were void under French law (R. 414).

REASONS FOR GRANTING THE WRIT.

I.

The Court below, in holding that the acts and declarations of a conspirator after the termination of the conspiracy are admissible against absent co-conspirators to show their intent, has created a novel doctrine of federal law in conflict with the applicable decisions of this Court. This doctrine does such violence to standards of justice in criminal cases as to require the exercise of the supervisory power of this Court over the administration of criminal justice.

The alleged objective of the conspiracy charged was to secure the illegal entry of three aliens at the port of New York (R: 5, 6). Upon the attainment of that objective the conspiracy terminated. *United States v. Rubenstein* (C. A. 2d, 1945), 151 F. (2d) 915, 917; *Fiswick v. United States* (1946), 329 U. S. 211. Despite this fact, the trial Court admitted against all defendants evidence of acts and declarations of each of them occurring outside the presence of the others and after the conspiracy had terminated. This evidence was received against all, over objection, on the sole ground (R: 66-69) that the indictment charged a subsidiary continuing conspiracy to conceal in the following language:

"It was further a part of said conspiracy that the said defendants would at all times subsequent to the formation of the said conspiracy conceal such transactions and acts aforesaid and would do such other, further and different acts as they might deem neces-

sary and expedient to prevent the disclosure to the United States Immigration and Naturalization Service of the existence of said conspiracy". (R. 7).

On appeal, the defendants contended that this Court in *Krulewitch v. United States* (1949), 336 U. S. 440, had expressly rejected the grounds upon which the trial court had admitted such evidence. In that case, this Court stated at pp. 443-444:

"This prerequisite to admissibility, that hearsay statements by some conspirators to be admissible against others must be made in furtherance of the conspiracy charged, has been scrupulously observed by federal courts. The Government now asks us to expand this narrow exception to the hearsay rule and hold admissible a declaration, not made in furtherance of the alleged criminal transportation conspiracy charged, but made in furtherance of an alleged implied but uncharged conspiracy aimed at preventing detection and punishment. . . . We are not persuaded to adopt the Government's implicit conspiracy theory which in all criminal conspiracy cases would create automatically a further breach of the general rule against the admission of hearsay evidence."

The Court below completely ignored the *Krulewitch* case and defendants' arguments based upon it. Instead, it adopted as a basis for the admission of this testimony a ground for which it cited no authority and which was never urged or argued by the government.¹ It permitted

1. The government, on appeal, had attempted to distinguish the *Krulewitch* case on the grounds that here the conspiracy to conceal was expressly charged in the indictment, whereas in that case this Court dealt with an implied conspiracy to conceal. The Court below apparently rejected this argument for the obvious reasons that (1) whether the conspiracy to conceal was expressly or impliedly charged was immaterial, and (2), the proof here disclosed that the defendants discussed their participation in the alleged conspiracy with virtually any and everyone and hence there was no proof of an effort to conceal at all.

the admission against *all* defendants of acts and declarations of each of the conspirators after the termination of the conspiracy, on the ground that such acts and declarations were relevant and competent on the question of defendants' intent to enter into and carry out the conspiracy. In this connection the Court below stated:

"Complaint is made that the court permitted evidence of events in America subsequent to the entries. When we remember that this case turned almost entirely upon the question of the validity of the Parisian marriages and that whether they were valid, in turn, depended upon *the intent of the parties at the time the ceremonies occurred*, it is clear that not only what was said and done prior to the time of the marriages, but that *the conduct of the parties and their statements* after they returned to America were relevant and competent for the jury to consider in determining whether in fact they reflected *an intent* to have performed valid marriages or whether they tended to show that *the intent* was merely to pretend to be married." (Emphasis added.) (R. 399.)

The decision below is in derogation of the firmly established principle that the acts and declarations of a conspirator are admissible against absent co-conspirators only when they occur during the conspiracy and in furtherance of the common design, and it is in conflict with decisions of this Court so holding. *Krulewitch v. United States* (1949), 336 U. S. 440, 443; *Fiswick v. United States* (1946), 329 U. S. 211; *Logan v. United States* (1892), 144 U. S. 263. The principle is itself an exception to the hearsay rule. The decision below now extends that exception so as to admit into evidence statements and acts of a conspirator not in furtherance of the conspiracy and after it has terminated in any case where intent is a factor. Since intent is a vital element in virtually every conspiracy, the force of the decision is to nullify the hearsay rule in

such prosecutions. It would even permit the use against one conspirator of the confession of another although made outside the presence of the first if the confession bears upon the question of intent, as most confessions do.

The decision below is so obviously in conflict with the decisions of other Circuits that it appears that no argument ought be required to demonstrate how patent is the error complained of.¹ However, we point out that this Court has already indicated by its reversal of the Court of Appeals for the Second Circuit in the *Krulewitch* case that it will not permit such an extension of the exception to the hearsay rule. In the decision there under review, *United States v. Krulewitch* (C. A. 2d, 1948), 167 F. (2d) 943, the lower Court had evidenced in its opinion a belief that post-conspiracy statements were admissible against absent co-conspirators on the question of intent. That Court stated, pp. 947-48:

"But while it might conceivably be held that this evidence was admissible to show appellant's intent [*United States v. Rubenstein*, 151 Fed. (2d) 915], we prefer to rest our decision on another ground. We think that implicit in a conspiracy to violate law is an agreement among the conspirators to conceal the violation after as well as before the illegal plan is consummated."

Quite obviously this Court, by reversing, took the view that neither ground set forth by the Court of Appeals for the Second Circuit was sufficient to permit the introduction of such evidence, since this Court would have affirmed the decision of the lower Court if either reason

1. Cf. *Dowdy v. United States* (C. A. 4th, 1931), 46 F. 2d 417; *Clark v. United States* (C. A. 5th, 1932), 61 F. 2d 409; *Tofanelli v. United States* (C. A. 9th, 1928), 28 F. 2d 580; *Holt v. United States* (C. A. 10th, 1937), 94 F. 2d 90; *Mora v. United States* (C. A. 5th, 1951), 190 F. 2d 749, 751.

or ground were correct. *Helvering v. Gowran* (1937), 302 U. S. 238; *J. E. Riley Inc. Co. v. Commissioner of Internal Revenue* (1940), 311 U. S. 55. That the Court of Appeals for the Second Circuit so understood is quite evident from its discussion in *United States v. Hall* (C. A. 2d, 1950), 178 F. (2d) 853, wherein it stated, p. 854:

"For, as we have been recently admonished, statements by one conspirator are to be received against others only when made in furtherance of a going conspiracy charged against them. *Krulewitch v. United States*, 336 U. S. 440."

This new breach of the general rule against the admission of hearsay evidence created by the Court below should not be permitted to remain open. As seen, the decision of the Court below has created a conflict with decisions of this Court and the Courts of Appeals for the other Circuits. As the concurring Justices observed in the *Krulewitch* case, p. 455, the Court below has created "an ominous expansion of the accepted law of conspiracy." As in that case, this Court ought to exercise its supervisory power over the administration of criminal justice and close the breach.

II.

In holding that wives are competent to testify against their husbands, the Court below has decided an important question of federal law in conflict with applicable decisions of this Court and in conflict with decisions of the Court of Appeals for the Second, Third and Sixth Circuits.

For the first time in 60 years, this Court is called upon to review a decision of a Court of Appeals directly holding that a wife is competent to testify against her husband in a criminal case not involving a personal wrong against her. The Court below, in so deciding, held that "under

the modern trend of thought in this country, the spouse, instead of being incompetent, is to be admitted as an interested witness, whose credibility is for the jury" (R. 412). It based this conclusion on an application of Rule 26 of the Federal Rules of Criminal Procedure providing that the competency and privileges of witnesses should be governed, in the absence of an act of Congress, by the principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience (R. 413).

The final resolution by this Court of the decision below is of the utmost importance. If permitted to stand it will have broad impact in almost every criminal case involving a married defendant. And since it is in direct conflict, as is hereafter shown, with decisions of this Court and Courts of Appeals for the Second, Third and Sixth Circuits, it creates a rule of evidence different from that prevailing in those Circuits. Further, the decision below will have national effect on the security and confidence of the marital relationship and will disturb domestic tranquility.

A. The decision of the Court below is in direct conflict with decisions of this Court.

In *Miles v. United States* (1881), 103 U. S. 304, and *Bassett v. United States* (1890), 137 U. S. 496, this Court decided that wives were not competent to testify against their spouses. This was recognized by this Court in *Griffin v. United States* (1949), 336 U. S. 705, 714-15, where the Court stated:

"The federal courts have held that one spouse cannot testify against the other unless the defendant spouse waives the privilege * * * * * Since this Court in the Funk case left open the question whether

this rule should be changed, *Funk v. United States*, 290 U. S. 371, 373 * * *, it 'presumably' is still the 'federal rule' for the lower courts."

B. The decision of the Court below is in direct conflict with the decisions of the Courts of Appeals for the Second, Third and Sixth Circuits.

Since this Court decided in *Funk v. United States* (1933), 290 U. S. 371, that spouses were competent to testify for each other, the Courts of Appeals for three Circuits have directly held that a wife is incompetent to testify against her husband in a federal criminal case. *Paul v. United States* (C. A. 3d, 1935), 79 F. (2d) 561; *Brunner v. United States* (C. A. 6th, 1948), 168 F. (2d) 281; *United States v. Walker* (C. A. 2d, 1949), 176 F. (2d) 564, cert. den. 338 U. S. 891. Prior to the decision of the Court below, only one Court of Appeals had declared otherwise. *Yoder v. United States* (C. A. 10th, 1935), 80 F. (2d) 665. But in that case, as Judge Learned Hand pointed out in *United States v. Walker*, (C. A. 2d, 1949), 176 F. (2d) 564, 568, the Court "did not have to decide the point, because the wife had in fact been divorced, and that made her testimony competent under the old law."

In the *Walker* case, Judge Hand, after reviewing the authorities, wrote at page 568:

"We conclude therefore that we should await the choice of Congress between the conflicting interests involved, or such an overwhelming general acceptance by the states of abolition of the privilege, as induced the Supreme Court to action in *Funk v. United States*, supra." (Emphasis added.)

C. The decision of the Court below conflicts in principle with the decision of this Court in *Funk v. United States* and with Rule 26 of the Federal Rules of Civil Procedure.

Under the *Funk* case changes in the law of evidence in federal criminal cases are to be permitted "in the light of fundamentally 'altered' conditions," 290 U. S. 371, 383. This Court there announced that in making such changes federal Courts are to look to reason and experience to find the present rule. Experience is to be ascertained from the general trend of legislative and judicial opinion. However, with respect to the rule making one spouse incompetent to testify against the other in a federal criminal case, conditions have not been fundamentally altered. The climate of judicial opinion remains the same. (See cases collected, 11 A. L. R. 2d 646 (1949).) Furthermore, reason dictates now that the marriage relationship should be protected against hostile testimony by one spouse against another as it did 100 years ago. Cf. *United States v. Blau* (1951), 340 U. S. 332, 334.

The Court below found a modern trend in cases dealing with crimes against the person of the wife, such as prostitution—an exception at common law—and in the *Yoder* case rejected by Judge Hand in *United States v. Walker* (C. A. 2d, 1949), 176 F. (2d) 564. An examination of state court decisions, however, shows that a "modern trend" such as moved this Court to action in the *Funk* case does not exist. The modern rule is stated at 11 A. L. R. 2d 648 (1949):

"Thus, a crime against one other than a spouse, regardless of other circumstances, is held by the great weight of authority not to be an offense which will qualify the defendant's spouse to testify for the prosecution."

Cases from only two states are cited in opposition to this proposition, while cases from fourteen states are cited in support of it.¹

The decision of the Court below, therefore, by announcing a new rule with respect to competency of spouses to testify against each other in criminal cases, in the face of an overwhelming weight of authority to the contrary, conflicts in principle with the decision of this Court in the *Funk* case, and with Rule 26 of the Federal Rules of Criminal Procedure.

1. Decisions by the Courts of Arkansas, Delaware, Georgia, Michigan, Missouri, Nebraska, North Carolina, Ohio, Oklahoma, South Dakota, Texas, Washington, West Virginia, and Wisconsin are cited in support of the above quoted proposition. In addition to decisions in some of these states, decisions by courts in Colorado, Connecticut, Minnesota, Mississippi, Pennsylvania, Tennessee and Utah are cited in support of the proposition that: "It has also been held by a majority of courts that a crime by one spouse against the other, even though it involves extreme personal violence, will not, if committed prior to the marriage, render the injured spouse competent as a witness against his or her wife or husband." 11 A. L. R. 2d 649. And decisions by courts in Illinois and Virginia are cited in support of the proposition that: "And, finally, where a crime committed by one spouse is essentially an offense against the property of the other (for example, arson, forgery, or theft), testimony of the latter is generally declared not to be admissible in evidence against the defendant." 11 A. L. R. 2d 650.

The Court below, in holding that the marriage laws of France would be presumed to be the same as those of Illinois, that it was therefore the duty of defendants to show them to be different if in fact they were, and that in the absence of such a showing the marriages were void under French law, decided important questions of criminal law and of conflict of laws in a manner contrary to settled principles, in such a manner as improperly to shift the burden of proof to the defendants, and in conflict with decisions of this Court and of Courts of Appeals for the Second, Third, Sixth, and Ninth Circuits.

The marriages in which the defendants participated and which the government alleged to be invalid took place in Paris, France (R. 60, 199, 247). The Court below conceded that the contest in the trial court centered about two factual questions—"Did the defendants conspire and if so, did the Government prove by competent evidence that the marriages were in fact invalid?" (R. 392.) As to the latter question, the Court below stated that if the defendants "had bona fide intentions to enter into the marital relation, they had a perfect right to invoke the provisions of the War Bride Act in gaining access to this country. We are confronted then with the crucial question of whether the evidence justified a finding that the so-called marriages were void." (R. 395-6.)

At the trial despite Petitioners' argument that the burden was on the government to prove the law of France with regard to the invalidity of the marriages, the trial court stated that it "would assume the law of Paris, France is the same as the law of Chicago, Illinois." (R. 189.) Consequently, no evidence as to French law was introduced by the Government.

A. The ruling of the Court below that the marriage laws of France would be presumed to be the same as those of Illinois conflicts with applicable decisions of this Court and of the Courts of Appeals for the Second and Ninth Circuits.

In its original opinion the Court below affirmed the ruling of the trial court on the question of French law but on the different ground that "a sham marriage, void under the laws of this country as against public policy, can have no validity. *Lincoln v. Riley*, 217 Ill. App. 571."

The petition for rehearing pointed out that *Lincoln v. Riley* referred only to a public policy which was declared by statute and that since in the case at bar there was no such declared public policy, the validity of the marriages should have been determined by the law of the place where they were contracted, *i. e.*, France.¹

The Court below thereupon, in its second opinion, shifted its ground but again reached the same result. This it did by ruling that the marriage laws of a foreign country, in the absence of proof to the contrary, are presumed to be the same as those of the forum and that the burden of showing the contrary was on petitioners. This ruling conflicts with decisions of this Court, holding that no such presumption may be engaged in, particularly where the law of the foreign country is derived from the civil law rather than common law regions.

The leading case on this subject is *Cuba R. Co. v. Crosby* (1912), 222 U. S. 473, in which this Court held that the

1. In this connection the petitioners in their briefs and petition for rehearing cited *U. S. v. Rubenstein*, (C. A. 2d 1945), 151 Fed. 2d 915; *Franzen v. E. I. DuPont de Nemours & Co.* (C. A. 3d, 1944), 146 Fed. 2d 837, and *Toshiko Inaba v. Nagle* (C. A. 9th, 1929) 36 Fed. 2d 481. These cases established that the validity of a marriage must be determined by the law of the place where contracted.

burden was on the plaintiff to prove that he had a right to recover under Cuban law and that in the absence of such proof it would not be presumed that the Cuban law was the same as that of the forum. See also *Church v. Hubbard* (1804), 2 Cranch. 287; *United States v. Wiggins*, 39 U. S. 334.

The decision below in this respect is also in conflict with decisions of the Second Circuit in the cases of *Cosulich Societa Triestina Di Navigazione v. Elting* (C. A. 2d 1933), 66 Fed. 2d, 534, 536; *U. S. ex rel. Jelic v. District Director of Immigration* (C. A. 2d, 1939), 106 Fed. 2d, 14; *Ozanic v. U. S.* (C. A. 2d 1948), 165 Fed. 2d 738, 744; and *Commissioner v. Hyde* (C. A. 2d, 1936), 82 Fed. 2d, 174.

In the first of these cases the question of an alien woman's admissibility to the United States depended upon the validity of her marriage by proxy in Italy to a man then domiciled in New Jersey and a citizen of the United States. No proof on the law of Italy on proxy marriages was introduced and the Court declined to presume it, stating that "It would be a violent presumption that [the law of Italy on that subject] corresponded with our own."

In the *Jelic* case the Court held that a failure by the Director of Immigration and Naturalization to prove the German law relating to forgery, vitiated a finding of moral turpitude by him against the respondent.

In the *Ozanic* case the Court held that there was no presumption that the law of Yugoslavia as to the measure of damages was the same as the United States, and finally in the *Hyde* case, the Court of Appeals for the Second Circuit ruled that there is no presumption that French law is the same as that of New York with respect to the construction of a trust agreement executed in France.

Further, the decision below also conflicts with the decision of the Court of Appeals for the Ninth Circuit in

Gordon v. Commissioner (C. A. 9th, 1935), 75 Fed. 2d, 429, 430, that there is no presumption that Canadian law as to the rights of a husband and wife is the same as California law.

To summarize the matter as plainly as possible, the rulings below (1) excused the government from proving what would otherwise be an essential fact; namely, the law of France with respect to the validity of the marriages involved; (2) pronounced the law of France to be the same as that of Illinois; (3) placed upon the defendants the burden of showing any differences between French and Illinois marriage law.

This position was taken in the absence of any showing that it would be improper or virtually impossible for the government to be required to prove French law, and in fact the Assistant United States Attorney indicated that he had looked into the French law to some extent (R. 189). And most startling of all, it was taken with respect to the laws of a country whose legal system has very little in common with our own. As the cases cited above indicate, the limits even in civil cases, of permissible presumptions as to foreign law are quite narrow where a civil law country such as France is involved. The limits are even narrower when the question is something other than a routine one. See *E. Geli & Co. v. Cunard S. S. Co.* (C. A. 2d, 1931), 48 F. 2d, 115; 117. Here, quite obviously, the question of the validity of the marriages was anything but simple, and in fact it is one upon which there is considerable divergence among the several states.

The authorities cited by the Court below in support of its ruling are singularly inapposite (R. 414). Not one of them is a federal criminal case. Not one of them is a criminal case involving the law of a foreign country. Not one of them presumes that the marriage law of a foreign coun-

ing burden of proof in criminal cases and permits presumptions as to the existence of facts essential to conviction.

The desire for the development of a uniform body of rules of evidence as expressed in Rule 26 of the Federal Rules of Criminal Procedure has been dealt a hard blow. The need for such uniformity is particularly vital in the field of conspiracy since it is there that the government may nearly always choose the venue. This is strikingly apparent in this case where, in addition to the conspiracy, the indictment contained five substantive counts which were dismissed because the proper venue as to them lay in the Southern or Eastern District of New York.

By bringing the indictment in the Northern District of Illinois rather than the Southern or Eastern District of New York, the government was able to by-pass rules of evidence applicable in the Second Circuit, which would have prevented the admission of all of the evidence here complained of. This court ought not place its imprimatur on such practices which can exist only because of lack of uniformity. The errors in the decision below require the exercise of the supervisory power of this court over the administration of criminal justice.

We earnestly urge that this petition for a Writ of Certiorari be granted.

Respectfully submitted,

ANTHONY BRADLEY EBEN,
RICHARD F. WATT,
BERNARD WEISSBURD,
Counsel for Petitioners.

JOSEPH L. NELLIS,
DUNNING, NELLIS & LUNDIN,
of Washington, D. C.,
Of Counsel.

and therefore lacked the capacity to remarry. When it came time for preparing instructions to the jury, however, he offered an instruction, No. 22, which had a place in the case only if the jury were being asked to consider whether Munio and Maria had been validly divorced. That instruction, as given, read: "The marriage of a man and woman where one of the parties thereto has a husband or wife by a prior marriage who is then living and undivorced is void" (R. 339 and 351).

In the Court of Appeals the Government at one point asserted that "a review of the entire record reveals that at no time did the government assert the bigamous marriage theory" (Answer to Pet. for Rehearing, p. 15), and at another that the purpose of Instruction No. 22 "was not meant to relate to a bigamous situation *only*" (emphasis added) (Answer to Pet. for Rehearing, p. 17). That word "only" amounts to a complete, though unintentional, disclosure.

The Court of Appeals conceded that whether or not Maria had been legally divorced from Munio Knoll was not determinable from the record (R. 393). Yet now the Government, in resisting the Petition for a Writ of Certiorari, apparently embraces the bigamous marriage theory which the prosecutor would not admit to, despite his offer of Instruction No. 22, and which the Government in the Court of Appeals expressly disclaimed. Thus the Government now asserts: "The second witness, Maria, had testified to an earlier marriage with Munio Knoll, and both her testimony and that of Munio Knoll adduced a rabbinical divorce in 1942 or 1943 of such questionable validity, and a record of such extensive living together with Knoll subsequent to his ceremony with Osborne, as raised serious question whether Knoll had ever obtained a valid divorce from Maria and was even free to enter into a second marriage (Gov't Bf., p. 24).

Parentetically, it is worth noting that in making this assertion the Government claims that Maria's testimony "adduced a rabbinical divorce," notwithstanding the fact that the prosecutor deliberately avoided the subject on direct-examination and prevented cross-examination with respect to it.

This review of the Government's off-again, on-again handling of an obviously significant issue serves to highlight the claim that Munio expressly waived his privilege to object to Maria's testimony against him (Gov't BF, pp. 5 and 24). To be sure, at one point Munio Knoll's counsel stated that he did not wish to take advantage of the objection to Maria's competence (R. 52). The following morning, however, before Maria testified, counsel endeavored to indicate to the court the quandry in which his client was placed, an effort which the trial court cut off with a curt "Oh, objection overruled;" counsel promptly noted an "Exception" (R. 56-57). The circumstances of this exchange, put in the full context of the Government's ambivalent attitude toward the "bigamous marriage theory" as it related to Munio and Maria, hardly justify the assertion that Munio expressly waived his privilege. On the contrary, since the Government in this Court wishes to take full advantage of what facts there are as to the "questionable validity" of the rabbinical divorce, the record ought not be read as showing a waiver.

In the absence of waiver, of course, Maria was competent to testify against Munio only if wives generally are competent to testify against husbands in criminal cases, for, since Maria's marriage to Munio was not controverted, the Court of Appeals' alternative position is inapplicable. This means, necessarily, that the broad question of competence is posed for decision.

3. } The Government endeavors to distinguish *Miles v.*

JUL 26 1951

CHARLES ELMORE CROFT

IN THE
Supreme Court of the United States

OCTOBER TERM, 1951.

No. 66

LIBRARY
SUPREME COURT, U.S.

MARCEL MAX LUTWAK, MUNIO KNOL, AND
REGINA TREITLER,
Petitioners,
vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

**PETITIONERS' BRIEF IN ANSWER TO BRIEF FOR
THE UNITED STATES IN OPPOSITION.**

ANTHONY BRADLEY EBEN,
RICHARD F. WATT,
BERNARD WEISSBOURD,

Counsel for Petitioners.

JOSEPH L. NELLIS,
DUNNING, NELLIS & LUNDIN,
Of Counsel.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1952.

No. 66.

MARCEL MAX LUTWAK, MUNIO KNOLL, AND
REGINA TREITLER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

**PETITIONERS' REPLY TO BRIEF FOR THE
UNITED STATES IN OPPOSITION.**

Because the Brief of the Government in opposition seeks to sustain the convictions upon grounds other than those stated by the Court of Appeals, and thereby to circumvent certain conflicts with this Court and with other Courts of Appeals, Petitioners consider it appropriate to file a Brief in reply.

Petitioners' contention that the admission into evidence against absent co-conspirators of acts and declarations of one conspirator after the termination of the conspiracy conflicts with the holding of this Court in *Krulewitch v. United States*, 336 U. S. 440 (1949), is met with the answer that the conspiracy did not terminate. The Government

thus ignores the holding of the Court of Appeals "that the conduct of the parties and their statements after they returned to America were relevant and competent for the jury to consider in determining whether in fact they reflected an intent to have performed valid marriages or whether they tended to show that the intent was merely to pretend to be married" (R. 399).

Petitioners' contention that the holding of the Court of Appeal that wives are competent to testify against their husbands in federal criminal cases is in conflict with applicable decisions of this Court and with decisions of the Courts of Appeals for the Second, Third, and Sixth Circuits, is disposed of with the observation that "the question is not here posed for decision, since the trial judge, upon the state of the record, had no wife before him nor even prima facie evidence of a marriage" (Gov't Bf., p. 23).

Finally, Petitioners' contention that the holdings of the Court of Appeals with respect to the Government's failure to prove that the marriages were void under French law conflicts with decisions of this Court and with the Courts of Appeals for the Second, Third, Sixth, and Ninth Circuits, is given no real answer at all. The Government merely says: "Petitioners, and in some degree the court below, have obscured the issues. * * * These questions are not reached" (Gov't Bf., pp. 25-26).

In other words, according to the Government, each of the main issues discussed and decided by the Court of Appeals, and raised by the Petition for a Writ of Certiorari, either does not exist, "is not here posed for decision," or "is not reached." The Brief for the United States in Opposition, therefore, may well be taken as an admission that, if these questions do exist and are posed, the decision of the Court below is in conflict with decisions

of Courts of Appeals for other Circuits and with decisions of this Court. The Government has thus gone far toward recognizing that this is a proper case for a Writ of Certiorari.

In order to demonstrate that these questions were properly before the Court below, and thereby to meet the thrust of the Government's arguments, it will be necessary to go to the record and to spell out what was charged in the indictment, what issues were determined by court and jury, and what was decided in the Court of Appeals. Yet even if the Government's position were well taken and reasons other than those expressed by the Court of Appeals justify the result, the fact that the decision below stands in the reports, full of conflicts with this Court and the Courts of Appeals for other Circuits, requires that there here be some resolution of these conflicts.

I.

The indictment charges the defendants with conspiring to commit the "offenses against the United States * * * set forth and described in Counts Two to Six, inclusive, of this indictment * * * and to defraud the United States of and concerning its governmental function and right of administering the immigration laws of the United States * * * free from fraud, deceit, misrepresentation * * *"
(R. 4-5).

The indictment also charges that "It was further a part of the said conspiracy that * * * after the aforesaid ostensible marriages had served their purposes to secure the entry of the * * * [aliens] into the United States for permanent residence as non-quota immigrants under Section 232, Title 8, United States Code, the parties to the aforesaid ostensible marriages would not live together in the United States as man and wife and thereafter would

take such legal steps to sever the formal bonds of said ostensible marriages as they saw fit" (R. 6-7).

And finally the indictment charges: "It was further a part of said conspiracy that the said defendants would at all times subsequent to the formation of the said conspiracy conceal such transactions and acts aforesaid" * * * (R. 7).

The offenses against the United States charged in Counts Two to Six involve false statements under oath, misrepresentations, or omissions in applications for admission to the United States filed at the Office of the United States Immigration and Naturalization Service at the Port of New York prior to, and as a prerequisite to, entry into the United States.

Clearly the crimes charged in the substantive counts all occurred prior to the time the aliens were permitted to enter the United States. Hence the conspiracy to commit the offenses against the United States charged in the substantive counts terminated with the entries. The Government takes the position, however, that the conspiracy to defraud the United States continued so long as the defendants concealed their acts from the Immigration and Naturalization Service and so long as the parties to the marriages remained undivorced. Thus a conspiracy without end is postulated, since two of the three marriages are still not dissolved.

Moreover, it is apparent that the reasons for rejecting an implied conspiracy to conceal in *Krulewitch v. United States*, 336 U. S. 440 (1949), are also applicable here, even though the Government relies upon the fact that the subsidiary conspiracy to conceal is charged in this indictment. The Court's opinion in the *Krulewitch* case, at page 444, points out that under the rule proposed by the Government "plausible arguments could generally be made

in conspiracy cases that most out-of-court statements offered in evidence tended to shield co-conspirators." Thus this Court refused to adopt a theory "which in all criminal conspiracy cases would create automatically a further breach of the general rule against the admission of hearsay evidence." In addition, Mr. Justice Jackson, in his concurring opinion in *Krulewitch*, at pages 456-57, rejected the Government's position because it would extend the statute of limitations and create a new judge-made crime.

These views are equally applicable to the present indictment. The charges with respect to living separately and obtaining divorces after entry and with respect to concealment do not charge substantive statutory crimes. Nor has it ever been held to be a fraud upon the United States to conspire to conceal a conspiracy or for husbands, and wives to live separate and apart and to obtain divorces.

In addition to these reasons for refusing artificially to extend the duration of the conspiracy beyond the dates of entry, there is the persuasive fact that the record is devoid of evidence to support the charges that the defendants conspired either to conceal their acts, to live separate and apart, or to obtain divorces. A conspiracy terminates when concerted action is no longer necessary to effectuate its purposes. *Fiswick v. United States*, 329 U. S. 211, 216 (1946); *Logan v. United States*, 144 U. S. 263, 322-23 (1892). Here the record is clear that whatever steps were taken toward divorce were individual rather than concerted. The record is also clear that the defendants apparently talked to anyone and everyone about their activities, thus doing the very opposite of attempting to conceal. In fact, almost the entire testimony of Government witnesses Ludmer and Haberman consisted of conversations with the defendants in which the defendants narrated past events with respect to the circumstances of the marriages and the entries into the United States.

The Government complains that, in any event, the Petitioners have not specified a single instance in which acts or declarations were admitted against all defendants after the termination of the conspiracy (Gov't Bf., p. 22, fn. 14). As a matter of fact, testimony of this type constituted a significant part of the Government's case, including:

- (1) The fact that Maria Lutwak and Munio Knoll lived together after they entered the United States Although married respectively to Marcel Lutwak and Bessie Osborne. This evidence also included testimony indicating that Maria Lutwak did not live with Marcel Lutwak and that Bessie Osborne did not live with Munio Knoll (Haberman, R. 28; Wicker, R. 140-143). The prejudice arising from such testimony became even greater when the court admitted against all defendants the testimony of witness Ludmer that he saw Marcel Lutwak with a plaster cast on his arm (R. 98) the day after Marcel Lutwak was supposed to have jumped out of a window. This is so because testimony had previously been admitted against Munio Knoll alone to the effect that this incident arose because Munio found Marcel in bed with Maria.
- (2) Testimony that Grace Klemtner Knoll did not live with Leopold Knoll after their entry into this country (Turner, R. 135-137, Grace Klemtner Knoll, R. 250-260).
- (3) Testimony as to Munio Knoll's request of Bessie Osborne that she withhold obtaining a divorce from him (Osborne, R. 208-209).
- (4) Photographs of certain of the defendants in night clubs which were admitted against all defendants (Haberman, R. 287).
- (5) Testimony indicating that Munio Knoll had told various people in New York that it was very easy to secure entry into this country if you had money and knew how (Haberman, R. 152-160).

Irrespective of the termination of the conspiracy, much of this evidence was not properly admitted against all defendants because not in furtherance of the conspiracy.

Just how did Munio Knoll's going with Maria to night clubs in New York and Chicago, together with friends, where their pictures were taken, in any way further the conspiracy? Yet Government Exhibits 22, 23, 24 and 25, consisting of such highly prejudicial photographs, were admitted against all the defendants (R. 287). And how did Munio Knoll's boast that it was easy to get into the country aid in the carrying out of the conspiracy?

II.

1. The treatment by the trial court, the Court of Appeals, and the Government, here and below, of the issue as to the competence of a wife to testify against her husband in a criminal case is marked by very real confusion. When the defendants initially challenged the competence of one of the wives, the Assistant United States Attorney took the position that under the principles of *Funk v. United States*, 290 U. S. 371 (1933), the wife was competent. This was likewise the impression of the trial court (R. 44, 46-48). After argument, however, the trial court made no such ruling. Rather, with respect to the witness Maria, it avoided ruling directly on the question (R. 51-52 and 56-57), and with respect to witness Bessie Osborne, it ruled that there was sufficient evidence to raise an issue of fact whether or not she was the wife of defendant Munio Knoll; consequently the witness was permitted to testify (R. 187).

The Court of Appeals, in its original opinion, approved what the trial court had done, and stated expressly that, since the jury by its verdict established that the marriages were invalid, the wives were competent. On this view it was proper for the jury to pass upon the question because the validity of the marriages had been controverted (R. 397-98).

In petitioning for rehearing the defendants once again argued the case of *Miles v. United States*, 103 U. S. 304 (1881), which the Court of Appeals had not mentioned, and which stands for the proposition that a witness cannot testify before the jury as to the very issue that must be proved to establish that witness' competence. Apparently because of the vigor of this argument, and because the question of the wives' competence "is of such importance in the law of evidence" (R. 405), the Court of Appeals, in its opinion on rehearing, launched into a lengthy discussion of the subject, concluding that under the doctrine of *Funk v. United States* and Rule 26 of the Rules of Criminal Procedure, "the wives were competent witnesses" (R. 405-13).

Only after so holding, however, did the Court of Appeals reaffirm its original conclusion that it was proper to permit the wives to testify in view of the prima facie showing in the record that the marriages were invalid (R. 413). The Court announced that "this rule we think is in accord with authoritative decisions," but it did not cite any cases and did not discuss or mention *Miles v. United States*, 103 U. S. 304 (1881).

The Government, in its Brief in opposition, declines to be drawn into a discussion of the second Court of Appeals' opinion, stating flatly that the question of the competence of a wife to testify against her husband "is not here posed for decision, since the trial judge, upon the state of the record, had no wife before him nor even prima facie evidence of a marriage" (Gov't Bf., p. 23). Yet even this contention is not consistent with the Court of Appeals' alternative view, according to which it was proper for the jury to pass upon the validity of the marriages and to hear the wives' testimony respecting those marriages on the basis of the prima facie showing of invalidity (R. 413).

The Government then attempts, albeit in a footnote, to dispose of *Miles v. United States*, 103 U. S. 304 (1881).

In urging that this Court not grant a Writ of Certiorari, the Government is thus asking that the opinions of the Court of Appeals be allowed to stand unreviewed, even though in endeavoring to justify them the Government recognizes that, to say the least, they are confused. In fact, the Government's Brief conclusively demonstrates that the Court of Appeals can be supported, if at all, only by arguments different from and inconsistent with those employed by that Court.

2. What is more, with respect to an important issue of fact the Government now takes a position different from that taken by the prosecution below and by the Court of Appeals. The Government now asserts that it was a serious question whether Munio Knöll ever obtained a valid divorce from Maria (Gov't Bf., p. 24). Quite obviously, if Munio had not been validly divorced he lacked the capacity to remarry. Yet the Government has blown hot and cold on this issue from the very beginning.

In his opening statement, the Assistant United States Attorney advised the jury that the evidence would show that Munio Knöll and Maria obtained "during the war, what is known as a rabbinical divorce in Budapest" (R. 23). When questioning Maria, however, the prosecutor carefully avoided asking any questions concerning such a divorce, and then successfully objected to any cross-examination with respect to it (R. 73). During the argument as to the competence of Maria to testify, the Assistant United States Attorney stated to the court that according to his information a rabbinical divorce was not recognized in Hungary as a civil divorce (R. 42-43). Nonetheless he declined to indicate whether or not the Government contended that Munio and Maria were never validly divorced.

United States, 103 U. S. 304 (1881), on the ground that it applies only to instances where the witness is *prima facie* incompetent. Here, the Government appears to assert, the evidence was such that the wives were *prima facie* competent. But this attempted distinction overlooks the fact that the question of *prima facie* competence or incompetence depends, not simply upon the evidence as of the time the witness is offered, but upon the status of the witness. Thus a wife, *qua* wife, is *prima facie* incompetent. Even when the evidence tends to show that the wife is not a legal wife, but is, for example, a bigamous wife, she is competent for certain purposes only, and she cannot testify before the jury as to the very issue which must be proved to establish her competence as a witness. This is the unqualified ruling of *Miles v. United States*, 103 U. S. 304 (1881).

The applicability of the *Miles* decision to the present case is readily apparent. Count 1, in essence, charges a conspiracy to arrange ostensible marriages for the purpose of bringing aliens into the United States under the so-called War Brides Act. In order to sustain its burden the Government was required to prove that such was in fact the sole purpose of the marriages, and that they were therefore not real marriages.

Under the *Miles* case, a wife in a plural or fraudulent or otherwise invalid marriage can testify only when the fact of its plural or fraudulent character is established. But the wife in such a marriage, even when its character is established, cannot testify with respect to the facts tending to show its character, but only with respect to other matters. For, clearly, so long as the facts having to do with the invalid character of the marriage are in dispute, the supposed wife, if she is permitted to testify concerning it, is in effect testifying with regard to her own competence. And such testimony, even where the wife's *prima*

facie incompetence is overcome by independent evidence, is not proper in view of the *Miles* case.

Here the defendants asked for *voir dire* examinations in order that the questions of competence could be determined out of the presence of the jury. The court refused, stating that it would allow the validity of the marriages to be determined by the jury (R. 41, 49, 56-57, 187-88, 224-26): In thereupon permitting the wives to testify with regard to the circumstances of the marriages, the court allowed evidence to go to the jury with respect to the very issues which had to be decided in order to establish wives' competence. Under the *Miles* case this was clearly error.

It will not do to contend, therefore, as the Government does, that at the time Bessie Osborne was permitted to testify "the evidence conclusively showed that her marriage was a sham" (Gov't Bf., p. 25, fn. 16). For, in the *Miles* case, when the second wife testified, the evidence showed that the defendant had a prior wife. According to the Government's argument here, the second wife in *Miles* consequently should have been permitted to testify against the defendant as to all issues, including the issue of the prior undissolved marriage. Yet it was this very testimony of the second wife that constituted error. Plainly, then, Bessie Osborne's testimony in this case, a major portion of which related to the circumstances of her marriage to Munio Knoll (R. 190-210), was error, since her testimony bore both upon the ultimate issue to be decided by the jury and also necessarily upon the issue determinative of her own competence.

Because of the importance of the *Miles* case in connection with this Petition, a more extensive analysis of it is included herein as an Appendix. In doing so, Petitioners wish to point out that the *Miles* decision has not been

adequately considered by the Court of Appeals or by the Government, either below or in this Court. Petitioners submit that it disposes completely of the alternative ground advanced by the Court of Appeals for permitting the wives to testify, which is the only ground relied upon by the Government in opposing the Petition for a Writ of Certiorari.

III.

The Government's answer to Petitioners' contention that the validity of the marriages should have been determined by French law is all but incomprehensible. The only thing that is clear is that the Government once again finds confusion in the Court of Appeals. For the Government's position in this Court is that the questions as to foreign law "are not reached" (Gov't. Bf., p. 26).

The argument appears to be that whether or not the parties were validly married under French law is immaterial, since the crime they were charged with was that of conspiring to create "only an outward appearance of marriage" (Gov't Bf., p. 26). If the defendants actually created valid marriages under French law, according to the Government, therefore, they did so in spite of their purpose and more or less by accident, so to speak. At most, then, such a result would have been a "slip-up" on the part of the conspirators.

The difficulty with this argument is that it overlooks completely what the indictment and trial were all about. For, no matter what the Government would like to make of them in this Court, the indictment and trial, and the argument in the Court of Appeals as well, rested upon the assumption that the Government had to show that the marriages were void in order to obtain convictions. The gist of the substantive counts of the indictment is the charge

that the defendants misrepresented their marital status, *i. e.*, asserted that they were married when in fact they were not (R. 9-14). The whole purport of the instructions as to the meaning of marriage, given to the jury by the trial court, related to the elements making for the validity or invalidity of a marriage (R. 339-40). The original opinion of the Court of Appeals stated that "The contest in the trial court centered largely about these two factual questions, viz., did defendants conspire and, if so, did the Government prove by competent evidence that the marriages were in fact invalid" (R. 392). The opinion also said that "before the jury could properly conclude that the scheme became an illegal conspiracy, it was necessary that the evidence be sufficient to justify a conclusion that the three marriages were void,—of no legal effect, and that they were so intended, for, if they were valid, the Government cannot complain" (R. 395).

Yet the Government asserts in this Court that whether or not the marriages were invalid is beside the point and that consequently it is unnecessary to decide which law should determine validity or invalidity. In view of what transpired in the trial court and the Court of Appeals, this assertion is, to put it mildly, an audacious one. For not only does it mean, of necessity, that the Court of Appeals and the trial court committed a serious bobble as to what the issues were, but also that the prosecution fumbled the indictment and trial. It suggests rather sharply, moreover, that the Petitioners were never adequately appraised as to the true nature of the charges against them, for, along with the trial court and the Court of Appeals, the Petitioners assumed that one key issue was whether the marriages were valid or not. Although this switch in position by the Government, and its abandonment of virtually everything the Court of Appeals had to say in affirming, may not constitute fatal variance,

at the very least it indicates that the Petitioners were convicted of conspiring to commit an offense, which, chameleon-like, changes its complexion from Government Brief to Government Brief and from court to court.

In consequence, this Court is faced with the following anomalous situation: *the Government—in asserting that the decision below is correct, according to which the Government had to prove the marriages invalid and could not complain if they were in fact valid—says that it was not incumbent upon the Government to prove that the marriages were invalid, since even if the marriages be valid the defendants were guilty!*

Conclusion.

The Petitioners were convicted of conspiracy. Yet, as has been indicated above, just what the Petitioners conspired to do is very hard to articulate, for with respect to what appears to be the heart of the indictment, the charge as to "ostensible" marriages, the Government and the Court of Appeals are in disagreement. Was the Government obliged to prove that the marriages were invalid? The Court of Appeals says yes. But the Government, in this Court, says no. Plainly, such imprecision, such apparent confusion, such a lack of consistency in legal argument, all in support of criminal convictions, are matters for grave concern, and particularly where, as here, those qualities permeate every phase of the case in every court.

The liberty of three persons is at stake—and with them, vital questions respecting the admissibility of evidence and the requirements of proof in conspiracy trials. Petitioners therefore renew their prayer that this Court grant its writ of Certiorari.

Respectfully submitted,

A. BRADLEY EBEN,
RICHARD F. WATT,
BERNARD WEISSBOURD,

Counsel for Petitioners.

JOSEPH L. NELLIS,
DUNNING, NELLIS & LUNDIN,
Of Counsel.

APPENDIX.

Miles v. United States, 103 U. S. 304 (1881).

The *Miles* case began as a prosecution for bigamy in the Territory of Utah. At the trial, after admitting declarations by the defendant to the effect that one Emily Spencer was his first wife, the prosecution offered as a witness Caroline Owens, the wife with whom the defendant was accused of having contracted a polygamous marriage. At that point the defendant admitted that he had married Caroline Owens and offered testimony to prove it, which proof the court rejected. The defendant therefore objected to the introduction of Caroline Owens as a witness on the ground that, being his wife, she was incompetent to testify against him. This objection was overruled, and the witness Caroline Owens gave testimony tending to prove the marriage of the defendant to Emily Spencer prior to his marriage to the witness.

In its charge to the jury the court stated:

A legal wife cannot, but when it appears in a case that the witness is not a legal wife but a bigamous or plural wife then she may, testify against the bigamous husband, and her testimony should have just as much weight with the jury as any other witness, if the jury believe her statements to be true.

On writ of error to the Supreme Court of Utah, the United States Supreme Court reversed, holding that the court erred in allowing Caroline Owens, the second wife, to give such evidence, and in instructing the jury that it might consider such testimony. After noting that under Utah law a husband could not be a witness for or against his wife, nor a wife for or against her husband, Mr. Justice Woods wrote for a unanimous Court:

The marriage of the plaintiff in error with Caroline Owens was charged in the indictment and admitted by him upon the trial. The fact of his previous marriage with Emily Spencer was, therefore, the only issue in the case, and that was contested to the end of the trial. Until the fact of the marriage of Emily Spencer with the plaintiff in error was established, Caroline Owens was *prima facie* his wife, and she could not be used as a witness against him.

The ground upon which a second wife is admitted as a witness against her husband, in a prosecution for bigamy, is that she is shown not to be a real wife by proof of the fact that the accused had previously married another wife, who was still living and still his lawful wife. It is only in cases where the first marriage is not controverted or has been duly established by other evidence, that the second wife is allowed to testify, and she can then be a witness to the second marriage, and not to the first.

The testimony of the second wife to prove the only controverted issue in the case, namely: the first marriage, cannot be given to the jury on the pretext that its purpose is to establish her competency. As her competency depends on proof of the first marriage, and that is the issue upon which the case turns, that issue must be established by other witnesses before the second wife is competent for any purpose. Even then she is not competent to prove the first marriage, for she cannot be admitted to prove a fact to the jury which must be established before she can testify at all.

Witnesses who are *prima facie* competent, but whose competency is disputed, are allowed to give evidence on their *voir dire* to the court on some collateral issue, on which their competency depends, but the testimony of a witness who is *prima facie* incompetent cannot be given to the jury upon the very issue in the case, in order to establish his competency, and at the same time prove the issue.

The authorities sustain these views * * * [citing authorities] * * *

The result of the authorities is that, as long as

the fact that the first marriage is contested, the second wife cannot be admitted to prove it. When the first marriage is duly established by other evidence, to the satisfaction of the court, the second may be admitted to prove the second marriage, but not the first, and the jury should have been so instructed.

In this case the injunction of the law of Utah, that the wife should not be a witness for or against her husband, was practically ignored by the Court. After some evidence tending to show the marriage of plaintiff in error with Emily Spencer; but that fact being still in controversy, Caroline Owens, the second wife, was put upon the stand and allowed to testify to the first marriage, and the jury were, in effect, told by the court that if, from her evidence and that of other witnesses in the case, they were satisfied of the fact of the first marriage, then they might consider the evidence of Caroline Owens to prove the first marriage.

In other words, *the evidence of a witness, prima facie incompetent and whose competency could only be shown by proof of a fact which was the one contested issue in the case, was allowed to go to the jury to prove that issue and at the same time to establish the competency of the witness.*

In this we think the court erred. (Emphasis added.)

The Miles opinion was acknowledged to be the law in a recent case by the Court of Appeals for the District of Columbia, *Matz v. United States*, 158 F. 2d 190 (App. D. C. 1946).

LIBRARY
SUPREME COURT. U.S.

Office - Supreme Court, U.S.

FILED

NOV 17 1952

HAROLD H. WILSON, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 66

MARCEL MAX LUTWAK, MUNIO KNOLL, AND
REGINA TREITLER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONERS.

ANTHONY BRADLEY EBEN,

RICHARD F. WATT,

BERNARD WEISSBOURD,

Counsel for Petitioners.

JOSEPH L. NELLIS,

DUNNING, NELLIS & LUNDIN,

Of Counsel.

INDEX.

SUBJECT INDEX.

| | PAGE. |
|--|-------|
| Opinions Below | 1 |
| Jurisdiction | 1 |
| Questions Presented | 2 |
| Statutes Involved | 3 |
| Statement of the Case..... | 5 |
| The Evidence | 8 |
| The Marital Status of Munio Knoll and Maria | 8 |
| Marcel Lutwak and Maria..... | 9 |
| Munio Knoll and Bessie Osborne..... | 11 |
| Leopold Knoll and Grace..... | 13 |
| Petitioners' Objections with Respect to The Evi- | |
| dence and Proof..... | 15 |
| Summary of Argument..... | 20 |
| Argument: | |
| I. Acts and declarations of a conspirator are not | |
| admissible against absent co-conspirators when | |
| not in furtherance of the conspiracy and after its | |
| termination. This is true even where a continu- | |
| ing conspiracy to conceal and avoid detection and | |
| prosecution is expressly charged, especially where | |
| no proof is adduced as to such an agreement or | |
| acts in furtherance of it. | 25 |
| A. Under the doctrine of Krulewitch v. United | |
| States, 336 U. S. 440 (1949), such acts and | |
| declarations are inadmissible | 25 |
| B. Post conspiracy acts and declarations are not | |
| admissible on the question of the intent of | |
| absent co-conspirators | 29 |
| II. Reason and experience both require the rule that | |
| in federal criminal cases one spouse cannot tes- | |
| tify against the other unless the defendant spouse | |
| waives the privilege..... | 31 |
| Experience in the states..... | 33 |
| In the light of reason..... | 38 |

| | |
|---|----|
| III. Where the competency of a witness who is prima facie incompetent can only be shown by proof of a contested fact, it is error to permit that witness to testify with respect to the very issue which must be proved to establish the witness' competency | 41 |
| IV. The validity of marriages performed in France is to be determined by French law, and there is no presumption that French law is the same as that of the forum. By failing to prove the law of France, the government failed to prove an essential element of the offense charged. Further, if there be such a presumption, it conflicts with and yields to a presumption in favor of the validity of marriages shown to have been performed | 44 |
| A. The government had the burden of establishing the invalidity of the Parisian marriages. That burden could not be shifted by reliance on a non-existent presumption that French law and the law of the forum are the same.. | 44 |
| B. Even if, arguendo, there be such a presumption, the marriages were not void under the law of the forum..... | 47 |
| C. The presumption of similarity of French law to the law of the forum yields to the presumption that a marriage when shown to have been performed is valid..... | 48 |
| V. Where two marriages are shown, the second is presumed to be valid, and the party attacking the second marriage must show that the first marriage has not been dissolved. Instruction No. 22, offered by the government and given by the court, is improper because of its failure to advise the jury of such a presumption. What is more the evidence does not support the giving of the instruction | 49 |
| Conclusion | 54 |

TABLE OF CASES.

| | |
|---|------------|
| Anonymous v. Anonymous, 49 N. Y. S. 2d 314 (1944) | 47 |
| Barrielle v. Beltman, 199 Fed. 838 (C. A. 10th 1912) | 47 |
| Beyerline v. State, 147 Ind. 125 (1897) | 36 |
| Black Diamond S. S. Corp. v. Robert Stewart & Sons, 336 U. S. 386 (1949) | 46 |
| Bonsalem v. Byron S. S. Co., 50 F. 2d 114 (C. A. 2d 1931) | 46 |
| Bove v. Pinciotti, 46 Pa. D & C 159 (1942) | 47 |
| Briggs v. United States, 90 F. Supp. 135 (Ct. Cl. 1950) | 52 |
| Brown v. United States, 150 U. S. 93 (1893) | 26, 31 |
| Brunner v. United States, 168 F. 2d 281 (C. A. 6th 1948) | 32 |
| Campbell v. Moore, 189 S. C. 197 (1939) | 47 |
| Chambliss v. United States, 218 Fed. 154 (C. A. 8th 1914) | 52 |
| Commissioner v. Hyde, 82 F. 2d 174 (C. A. 2d 1936) | 47 |
| Commonwealth v. Stevens, 196 Mass. 280 (1907) | 45 |
| Crude Oil Corp. of America v. C. I. R., 161 F. 2d 809 (C. A. 10th 1947) | 48 |
| Cuba R. Co. v. Crosby, 222 U. S. 473 (1912) | 23, 46 |
| Dalton v. United States, 154 Fed. 461 (C. A. 10th 1907) | 48 |
| Delfino v. Delfino, 35 N. Y. S. 2d 693 (1942) | 47 |
| DeVries v. DeVries, 195 Ill. App. 4 (1915) | 23, 47, 48 |
| Erickson v. Erickson, 48 N. Y. S. 2d 588 (1944) | 47 |
| Ertel v. Ertel, 313 Ill. App. 326 (1942) | 48 |
| Ezzard v. United States, 7 F. 2d 808 (C. A. 8th 1925) | 45 |
| Figwick v. United States, 329 U. S. 211 (1946) | 26, 31 |
| Flynn v. Tröesch, 373 Ill. 275 (1940) | 48 |

| | |
|---|--------------------|
| Franzen v. E. I. Du Pont de Nemours & Co., 146 F. 2d 837 (C. A. 3d 1944)..... | 46 |
| Freeman S. S. v. Pillsbury, 172 F. 2d 321 (C. A. 9th 1949) | 48 |
| Funk v. United States, 290 U. S. 371 (1933)..... | 21, 37 |
| Gaines v. City of New Orleans, 73 U. S. 642 (1868)... | 45, 48 |
| Gaines v. Hennen, 65 U. S. 553 (1861)..... | 45 |
| E. Geli & Co. v. Cunard S. S. Co., 48 F. 2d 115 (C. A. 2d 1931) | 49 |
| Griffin v. United States, 336 U. S. 705 (1949)..... | 32, 35 |
| Hanson v. Hanson, 287 Mass. 154 (1934)..... | 47 |
| In re Estate of Dedmore, 257 Ill. App. 519 (1930) . | 24, 52, 54 |
| Krulewitch v. United States, 336 U. S. 440 (1949)... | 20, 26, 28, 29, 30 |
| Lilienthal's Tobacco v. United States, 97 U. S. 237 (1878) | 45 |
| Logan v. United States, 144 U. S. 263 (1892)..... | 26, 31 |
| Marris v. Sockey, 170 F. 2d 599 (C. A. 10th 1948) . | 45, 48, 52 |
| Mathews v. Jones, 149 F. 2d 893 (C. A. 5th 1945)... | 45, 48 |
| Matz v. United States, 158 F. 2d 190 (App. D. C. 1946) | 41 |
| McCormick v. State, 186 S. W. 95 (Tenn. 1916)..... | 36 |
| Mercer v. State, 40 Fla. 216 (1898)..... | 36 |
| Meyer v. United States, 258 Fed. 212 (C. A. 7th 1919) | 52 |
| Michelson v. United States, 335 U. S. 469 (1938)..... | 38 |
| Miles v. United States, 103 U. S. 304 (1881)... | 22, 41, 42, 43 |
| Ozanic v. United States, 165 F. 2d 738 (C. A. 2d 1948) | 46 |
| Paul v. United States, 79 F. 2d 561 (C. A. 3d 1935)... | 32 |
| People v. Daghita, 299 N. Y. 194 (1949)..... | 36, 39 |
| Potter v. Clapp, 203 Ill. 592 (1903)..... | 52 |
| Prentis v. McCormick, 23 F. 2d 802 (C. A. 6th 1928)... | 52 |

| | |
|---|--------|
| Schidi v. Schidi, 136 Conn. 196 (1949)..... | 47 |
| State v. Henneman, 40 N. M. 166 (1936)..... | 45 |
| Toshiko Inaba v. Nagle, 36 F. 2d 481 (C. A. 9th 1929)..... | 46 |
| United States v. Blau, 340 U. S. 332 (1951)..... | 38 |
| United States v. Breitling, 20 How. 252, 15 L. Ed. 900 (1858) | 52 |
| United States v. Falcone, 109 F. 2d 579 (C. A. 2d 1940) | 31 |
| United States v. Green, 98 Fed. 63 (C. A. Iowa 1899) .. | 52 |
| United States v. Guido, 161 F. 2d 492 (C. A. 3d 1947) | 29, 31 |
| United States ex rel. Jelic v. District Director of Im- migration, 106 F. 2d 14 (C. A. 2d 1939)..... | 46 |
| United States v. Rubenstein, 151 F. 2d 915 (C. A. 2d 1945) | 26 |
| United States v. Walker, 176 F. 2d 564 (C. A. 2d 1949) | 21, 32 |
| Wagner v. Wagner, 59 Pa. D & C 90 (1947)..... | 47 |
| Walker v. United States, 180 F. 2d 217 (C. A. 7th 1950) | 52 |
| Yoder v. United States, 80 F. 2d 665 (C. A. 10th 1935) | 32 |

United States Statutes.

| | |
|--|------|
| Title 8, U. S. C. § 180a..... | 3, 6 |
| Title 8, U. S. C. § 220(c)..... | 3, 6 |
| Title 8, U. S. C. § 232..... | 3, 5 |
| Title 18, U. S. C. § 88 (the revised Criminal Code section is Title 18, U. S. C. § 371 (1948))..... | 3, 5 |

State Statutes.

| | |
|--|-------|
| A tabulation of the statutes of the forty-eight states dealing with testimony by one spouse against another in criminal cases is set out in the text of the Argument | 33-37 |
|--|-------|

Miscellaneous.

| | |
|---|----|
| Rule 26, Federal Rules of Criminal Procedure..... | 31 |
| Wigmore, Evidence, 3rd Ed., § 2227..... | 33 |

IN THE
Supreme Court of the United States

OCTOBER TERM, 1952.

No. 66.

MARCEL MAX LUTWAK, MUNIO KNOLL, AND
REGINA TREITLER,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONERS.

OPINIONS BELOW.

The original opinion of the Court of Appeals for the Seventh Circuit, dated January 3, 1952 (R. 391-400), and the supplemental opinion, dated April 16, 1952 (R. 404-14), are reported at 195 F. 2d 748 (C. A. 7th, 1952).

JURISDICTION.

The judgments of the Court of Appeals were entered on January 3, 1952 (R. 401-03). A petition for rehearing was filed on January 18, 1952 (R. 403). It was denied on April 16, 1952 (R. 415).

The petition for a writ of certiorari was filed on May 16, 1952, and was granted on October 13, 1952. 73 S. Ct. 13. Jurisdiction in this Court is conferred by 28 U. S. C., § 1254 (1).

QUESTIONS PRESENTED.

1. Are wives competent to testify against their husbands in a federal criminal case involving no personal wrong to the wives?

2. Is it proper for the wives of defendants in a federal criminal case, although presumed to be *prima facie* incompetent as witnesses, to testify as to the very facts necessary to establish their competency, when those facts constitute a major portion of the evidence with respect to the principal issue to be determined by the jury?

3. Are the acts and declarations of a conspirator after the termination of a conspiracy and not in furtherance of it admissible against absent co-conspirators on the question of their intent to conspire?

4. In a federal criminal case, in which the government is seeking to establish the invalidity of marriages contracted in a foreign country, is not the burden upon the government to prove such invalidity under the applicable foreign law, and does not that burden require the government to prove the foreign law?

5. Where two marriages are shown, is it not the presumption that the second marriage is valid, and is not the burden on the party attacking such second marriage to overcome the presumption that the first marriage was dissolved? Is not an instruction which fails to indicate to the jury that there is a presumption in favor of the second marriage erroneous?

STATUTES INVOLVED.

Title 8, U. S. C., Section 180a:

Any alien who after March 4, 1929, enters the United States at any time or place other than as designated by immigration officials or eludes examination or inspection by immigration officials, or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall be guilty of a misdemeanor and, upon conviction, shall be punished by imprisonment for not more than one year or by a fine of not more than \$1,000, or by both such fine and imprisonment.

Title 8, U. S. C., Section 220(c):

Whoever knowingly makes under oath any false statement in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, shall, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both.

Title 18, U. S. C., Section 88 (the revised Criminal Code provision is 18 U. S. C., Section 371 (1948)):

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both.

Title 8, U. S. C., Section 232:

Notwithstanding any of the several clauses of section 136 of this title, excluding physically and mentally defective aliens, and notwithstanding the documentary requirements of any of the immigration laws

or regulations, Executive orders, or Presidential proclamations issued thereunder, alien spouses or alien children of United States citizens serving in, or having an honorable discharge certificate from the armed forces of the United States during the Second World War shall, if otherwise admissible under the immigration laws and if application for admission is made within three years of December 28, 1945, be admitted to the United States. • • •

STATEMENT OF THE CASE.

The three petitioners were convicted by a jury sitting in the United States District Court for the Northern District of Illinois, Eastern Division (R. 358-60), and given sentences of two years imprisonment and fines of \$10,000 each (R. 366-67). These convictions were based upon the first count, charging a conspiracy in violation of Title 18, U. S. Code, Section 88 (R. 4-9), of what had originally been a six-count indictment. The judgments of conviction were affirmed by the Court of Appeals for the Seventh Circuit (R. 401-03).

Count I charged the petitioners, together with Grace Klemtnr Knoll and Leopold Knoll, with conspiring (1) to commit the offences set forth in the five substantive counts, and (2) to defraud the United States of and concerning its governmental function and right to administer the immigration laws and the Immigration and Naturalization Service of the Department of Justice honestly and free from fraud (R. 4-5).

Count I also charged that "it was further a part of said conspiracy that the said defendants would at all times subsequent to the formation of said conspiracy conceal such transactions and acts aforesaid and would do such other, further and different acts as they might deem necessary and expedient to prevent the disclosure to the United States Immigration and Naturalization Service of the existence of said conspiracy" (R. 7).

The five substantive counts charged petitioners with securing the illegal entry under the War Brides Act (Title 8, U. S. Code, Section 232) at the Port of New York of two aliens—Leopold Knoll and the petitioner Munio Knoll—

by means of false and misleading representations and the concealment of material facts with respect to the marital status of the aliens, in violation of Title 8, U. S. Code, Section 180a; and with making false statements under oath concerning those aliens' and Maria Knoll Lutwak's marital status in applications required by the immigration laws of the United States, in violation of Title 8, U. S. Code, Section 220(c) (R. 9-14).

In effect, the indictment, taken as a whole, charged that the petitioners, and Leopold Knoll and Grace Klemtner Knoll, had conspired to arrange and had arranged "ostensible marriages" between discharged veterans and aliens for the purpose of securing the entry of the aliens into the United States under the War Brides Act.

The conspiracy, according to the indictment, involved Marcel Lutwak's journeying to Paris to "go through the form of a marriage ceremony with Maria Knoll" in order to permit her to enter the United States as the alien spouse of a United States citizen having an honorable discharge from the armed forces (R. 5); Bessie Osborne's going to Paris for the similar purpose of going through a marriage ceremony with Munio Knoll and bringing him to the United States as the alien spouse of an honorably discharge veteran (R. 6); and Grace Klemtner's travelling to Paris in order to go through a marriage ceremony with Leopold Knoll and to bring him into the country as the alien spouse of an honorably discharged veteran (R. 6). These marriages were to be "ostensible marriages", that is, "marriages in form only" and were to be "entered into by the parties thereto solely for the purpose of representing them as marriages to the United States Immigration and Naturalization Service" (R. 6).

Grace Klemtner Knoll was dismissed from the indictment prior to trial on the ground that her constitutional

privilege against self-incrimination had been invaded at the time she was taken before the Grand Jury (R. 18, 224-25). Various other motions to dismiss were denied (R. 18-19).

At the trial, when the government had concluded its case, petitioners moved for acquittal on the substantive counts on the ground, among others, that proper venue had not been proved (R. 288). The court declined to enter judgments of acquittal but did dismiss all five substantive counts for the reason that proper venue, which would have been the Southern or Eastern District of New York, had not been shown (R. 290-91).

The petitioners, as defendants, offered no evidence, and the court presented the case to the jury on the conspiracy count alone (R. 333). In separate verdicts, the jury found Leopold Knoll not guilty and Marcel Max Lutwak, Munio Knoll, and Regina Treitler, the petitioners herein, guilty as charged in Count I of the indictment (R. 358-61).

THE EVIDENCE.

Munio Knoll, Leopold Knoll, and Regina Treitler are brothers and sister, and Marcel Lutwak is their nephew (R. 61). The latter two are, and in 1947 were, citizens of the United States, having resided in this country for a number of years. Marcel Lutwak, in 1947, was an honorably discharged veteran (R. 62). In the summer of 1947, Munio Knoll and Leopold Knoll, having been driven from their homes in Poland by the war and having for a time been held in Nazi concentration camps, were living as refugees in Paris (R. 29, 36, 60-61). Maria, who had been married to Munio Knoll in Poland in 1932, was also residing in Paris (R. 60). At this time the other participants, Bessie Osborne and Grace Klemtner, were American citizens residing in Chicago after having been honorably discharged from the armed forces (R. 190, 226-27).

Although only three marriages are charged to have been "ostensible" marriages, a proper understanding of the issues requires consideration of a fourth marriage, *i. e.*, that of Munio Knoll and Maria. The evidence as to all four of these marriages is set out below.

The Marital Status of Munio Knoll and Maria.

Maria testified that she and Munio Knoll had been married in Poland in 1932, in a strictly religious ceremony performed by a rabbi (R. 60, 72). Although the Assistant United States Attorney advised the jury in his opening statement that the evidence would show that Munio and Maria had obtained "during the war what is known as a rabbinical divorce in Budapest" (R. 23), he purposely refrained from asking Maria any questions with respect

to such a divorce and even successfully objected to any cross-examination concerning it (R. 73, 78). On the basis of Maria's testimony, therefore, the jury learned only that Maria had married Munio Knoll in Poland in 1932 and Marcel Lutwak in Paris in 1947 (R. 60).

The statements of Munio Knoll before the immigration and naturalization authorities, which were admitted into evidence against him and read to the jury, indicated, however, that some kind of divorce proceeding had taken place in Budapest in 1942 (Gov't Ex. Nos. 13 and 14, R. 281-82).

With this evidence in the record, the Court of Appeals stated that whether Maria "had been legally divorced from * * * [Munio] is not determinable from the record" (R. 393, fn. 1), and in its opinion spoke of Maria as the "undivorced or divorced wife" of Munio (R. 393).

At the time of the colloquy in the trial court concerning the competence of Maria to testify, the Assistant United States Attorney declined to indicate whether or not the government contended that Munio and Maria were never validly divorced and hence lacked the capacity to remarry, although he did state to the court that according to his information a rabbinical divorce was not recognized in Hungary as a civil divorce (R. 42-43).

Marcel Lutwak and Maria.

The only direct testimony relating to the marriage of Marcel Lutwak and Maria in 1947 came from Maria as a government witness. Maria testified that she and Marcel met in Paris at the end of July or the beginning of August 1947 (R. 60-61). During a courtship of approximately four weeks, Marcel and Maria fell in love and were married (R. 60, 76). The marriage ceremony, which took place in Paris in August, was performed by civil authorities, and

Maria received no wedding ring (R. 60, 62). The marriage was consummated (R. 78), and the couple lived in Paris as man and wife (R. 82).

Marcel and Maria entered the United States at the Port of New York on September 9, 1947. After they had filled out and submitted the forms required by the immigration authorities, Maria was admitted as the spouse of an honorably discharged veteran (R. 62-64). They journeyed to Chicago (R. 64), where they were met at the railroad station by members of the family (R. 90). Maria thereupon went to Mrs. Treitler's home at 35 South Central Park Avenue. Marcel did not go with her (R. 65). Thereafter, although Marcel and Maria spent a great deal of time together (R. 84), they resided at different addresses (R. 65, 69). For a time Maria lived with a Mrs. Sager, a sister of Mrs. Treitler (R. 65), and later she obtained an apartment on West Maypole Street (R. 65-66). In February 1948, Maria went to New York (R. 66), returned to Chicago in June to see her husband Marcel, and then took up permanent residence in New York in November of 1948 (R. 69).

Maria's testimony, together with that of government witnesses Ludmer, Haberman, and Wicker, indicated that for periods, while Maria lived with Mrs. Treitler and subsequently in the apartment at West Maypole Street, Munio Knoll lived at the same places (R. 65, 66, 69, 104-05, 177). The rent on the apartment on West Maypole Street was paid originally by Maria and then by Munio (R. 141). It consisted of a large bedroom, a large living room, a kitchen, and a bathroom (R. 140). At various times Maria and Marcel, or Maria and Munio, or all three of them were observed at the apartment (R. 118, 140).

On several occasions, Munio Knoll held Maria out to be his wife (R. 153, 172), attended night clubs with her (R.

176, 178), and was with her in hotels in New York City (R. 165, 167). During the summer of 1948 Munio Knoll and Maria visited friends in Michigan and spent the night together in the same room (R. 143).

Witness Ludmer also testified that he saw Marcel Lutwak with a plaster cast on his arm (R. 98) the day after Marcel was supposed to have jumped out of a window at the West Maypole Street apartment when Munio found him there with Maria. (R. 99-101, 169-70). This latter item of evidence, which consisted of witness Ludmer and witness Haberman relating what Munio Knoll had said in conversation, was admitted against Munio alone (R. 99).

In April of 1950 Marcel Lutwak obtained a divorce from Maria (R. 70).

Munio Knoll and Bessie Osborne.

In the late summer of 1947, a Mrs. Zapler was approached by the petitioner Regina Treitler and asked if she knew of any girl willing to go to Europe to bring back a brother of Mrs. Treitler's who had been starved and beaten (R. 30, 31). Mrs. Treitler indicated that she wanted a girl who had been in service and said that she would pay the girl her expenses and a fee; Mrs. Treitler also stated that the marriage need not be consummated and that after six months there could be a divorce (R. 37-38).

In the latter part of September, Mrs. Zapler introduced Bessie Osborne, a former Wave, to Marcel Lutwak, who had recently returned from Europe where he had married Maria (R. 32-33, 193). Marcel at that time asked Bessie Osborne if she would go to Europe to marry his uncle, who was in need of medical care, and to bring him to the United States. He said he would pay her \$1,000.00 for doing this (R. 193). Mrs. Treitler later made the same request of

Bessie Osborne (R. 194-95). These requests originally had to do with Bessie's going to Paris to marry Leopold, and she had been told that it might be a true marriage, involving romance (R. 220). Later, however, Marcel asked her to marry the other uncle, Munio, rather than Leopold (R. 196). Bessie agreed to go and left for Paris by plane, together with Mrs. Treitler, on October 25, 1947 (R. 198). Bessie's ticket was paid for and she received money for clothes (R. 196-97).

Approximately a week after arriving in Paris and meeting Munio Knoll, Bessie Osborne and Munio were married in a civil ceremony (R. 191). Bessie did not receive a wedding ring (R. 199). Prior to the marriage the necessary arrangements were made at the office of a lawyer in Paris and at the American Consulate (R. 199). After the marriage Bessie continued to live by herself in a room at the Khedive Hotel and then at the Royal Monceau Hotel (R. 200). She testified that the marriage was not consummated and that Munio and she never lived as man and wife (R. 210).

Bessie and Munio returned to the United States via Brussels, traveling by plane. They entered at the Port of New York on November 13, 1947, at which time the documents required for Munio's admission were filled out (R. 203). From New York Munio and Bessie flew directly to Chicago, where they separated (R. 204). Approximately three days after arriving in Chicago, Bessie, Munio, and Marcel Lutwak met at a downtown restaurant, and Marcel gave Bessie a check for \$1,000.00 (R. 205-06).

In May of 1950 Bessie began a divorce suit against Munio (R. 208). About six months after their return to the United States, Munio had asked Bessie to delay getting a divorce for two years because he wanted to become an American citizen, and Bessie agreed (R. 208). Later, some-

time in 1950, Bessie asked Munio not to oppose her divorce, and Munio asked her to wait until after the trial (R. 209). The first of these two conversations was admitted against all the defendants (R. 208), but the latter was admitted only as against Munio (R. 209).

Leopold Knoll and Grace.

Grace Klemtner and Mrs. Treitler were acquaintances for a number of years (R. 238). Approximately one month before Mrs. Treitler left for Europe, she informed Grace that she was going. Grace decided to go about the same time, and she and Mrs. Treitler talked about the trip (R. 229). Grace told Marcel that she was planning to travel to Europe (R. 233). Marcel assisted her in applying for her passport (R. 236-37), and took her to the airport on November 1, 1947 (R. 234). Marcel did not inform Grace that he himself had recently been to Paris and had been married there (R. 234).

Testifying as a court's witness, Grace refused to state on grounds of possible self-incrimination whether she had talked with Marcel Lutwak or Mrs. Treitler about Leopold Knoll before leaving for Paris (R. 247). For the same reason she refused to tell where she had obtained the money to pay for her ticket (R. 242). She did state, however, that she never received any money from Marcel other than a small loan (R. 247).

Upon arriving in Paris on November 2, 1947 (R. 246), Grace was met by Mrs. Treitler and Leopold Knoll (R. 230). Grace stayed at the Khedive Hotel, where Mrs. Treitler had arranged a room for her (R. 229, 249). While in Paris she met Bessie Osborne (R. 245), and Bessie was present at a conversation between Leopold and Grace when Leopold told Grace that he would not marry her if it were not going to be permanent and if Grace's only purpose

were to get him into the United States (R. 216, 259). Grace then agreed to marry Leopold for "all time to come" (R. 259), and the ceremony was performed in Paris on November 6, 1947 (R. 247). The marriage was consummated in Paris (R. 260). Grace did not receive a wedding ring from Leopold (R. 246).

Grace and Leopold returned to the United States on December 5, 1947, entering at the Port of New York, where the necessary immigration forms were prepared (R. 251-52). After entry, Grace and Leopold went to different hotels in New York (R. 254). Grace went to Chicago and then to California with her friend Jane Turner (R. 254-55). Grace's decision to go to California was occasioned by difficulties between her and Leopold; Grace wanted to get away from his family, thinking that would facilitate the necessary adjustments between herself and Leopold (R. 263). For a while she worked in Los Angeles (R. 256), and then began college there under the GI Bill (R. 263). Leopold did not visit Grace in Los Angeles (R. 257), but he corresponded with her and sent her money (R. 138, 263-64). Although Leopold and Grace did not commence living as man and wife upon arriving in the United States, they did live together on several occasions after April of 1950, when Grace first came to Chicago to testify before the grand jury (R. 257, 260). Grace also testified that she wanted to live with Leopold as his wife permanently (R. 260), and that Leopold had indicated to her his intention to live with her (R. 261).

PETITIONERS' OBJECTIONS WITH RESPECT TO THE EVIDENCE AND PROOF.

The questions which petitioners have raised and which are now before this Court for determination relate either to the admission of certain kinds of evidence or to the burden of proof imposed upon the prosecution by the indictment.

Taking up these questions in the order in which they appear above under "Questions Presented," the problems may be stated as follows:

1. The question as to the competency of a wife to testify against her husband in a federal criminal case involving no personal wrong to the wife arises because Maria (possibly still the wife of Munio), Bessie Osborne (possibly the wife of Munio), and Grace Klemtner Knoll (the wife of Leopold) all testified over objection (R. 41-42, 56-57, 187, 225). Furthermore, the record indicates that Maria and Grace were unwilling witnesses who testified only because compelled to. Thus, Maria, immediately upon being called to the stand, stated that she wished to talk to the judge, a request the judge declined to grant (R. 40). Grace was called as a court's witness, having been subpoenaed in California for the trial, stated to the court that she believed she needed counsel, and declined to answer several questions for fear of possible self-incrimination (R. 224-26, 240-42, 247, 264). Moreover, Grace had originally been indicted as a co-conspirator (R. 4-9) and had been dismissed from the indictment because of the prosecution's infringement of her constitutional rights (R. 18, 224-25).

Necessarily, insofar as this problem relates to the competency of Maria as a witness, the marital status of Maria

and Munio is involved. The facts concerning that status have been set out above.

2. The problem of the competency of a wife, the validity of whose marriage to a defendant is disputed by the prosecution, to testify before the jury without any prior *voir dire* examination as to such facts as show the invalidity of the marriage and thus her competency as a witness, where that very issue of invalidity is one of the key questions to be resolved by the jury, is presented by the testimony of Bessie Osborne (R. 190-226) and Grace (R. 226-67). For their testimony, significant portions of which have been summarized above under the respective headings "Munio Knoll and Bessie Osborne" and "Leopold Knoll and Grace," in large part had to do with the circumstances of their marriages, which circumstances, such as the absence of wedding rings (R. 199, 246), might indicate to the jury that the marriages were invalid. The invalidity of the marriages was a prerequisite to the witnesses' competency. It was also an essential element in the government's case. In fact the instructions given by the trial court as to the meaning of marriage related in large part to the elements making for the validity or invalidity of a marriage (R. 339-40).

Moreover, the Court of Appeals, in its original opinion, stated that "The contest in the trial court centered largely about these two factual questions, viz., did defendants conspire and, if so, did the Government prove by competent evidence that the marriages were in fact invalid" (R. 392). The Court of Appeals also said that "before the jury could properly conclude that the scheme became an illegal conspiracy, it was necessary that the evidence be sufficient to justify a conclusion that the three marriages were void, of no legal effect, and that they were so intended, for, if they were valid, the Government cannot complain" (R. 395).

Requests for *voir dire* examinations were refused (R. 187-89, 225-6).

3. The question as to the admissibility against absent conspirators of acts and declarations of a co-conspirator after the termination of a conspiracy and not in furtherance of it arises directly from the indictment itself as well as from the nature of much of the government's proof. The indictment charged a continuing conspiracy to conceal the existence of the major conspiracy (R. 7), apparently right up to the date of the indictment (R. 4), and listed overt acts which took place over two years after the entry of the three aliens into the United States (R. 9). Much of the evidence of government witnesses Maria Lutwak (R. 58-92); Ludmer (R. 92-130), Turner (R. 130-38), Wicker (R. 138-45), Haberman (R. 150-84), Bessie Osborne (R. 186-226), and Grace Klemtner Knoll (R. 226-67) had to do with acts and events long after the entries. Despite objection such testimony was admitted against all (R. 282-84, 286-88). Thus evidence that Marcel and Maria resided at different addresses and that Munio and Maria lived at the same apartment (R. 65-66, 69, 104-05, 177), that Munio did not live with Bessie Osborne (R. 210), and that Leopold and Grace lived apart (R. 135-37, 250-60) was admitted generally against all. Likewise, photographs of certain of the petitioners, taken in night clubs in New York and Chicago and showing Munio and Maria together, were admitted against all the defendants (Gov't Exs. Nos. 22, 23, 24, and 25, R. 160-61, 168-69, 176, 178, 181-84, 280, 287).

In addition, statements of one conspirator in the absence of the others, which were either not in furtherance of the conspiracy or were subsequent to the entries of the aliens into the United States, were admitted against all defendants. Thus Bessie Osborne testified that Munio had

asked her to delay divorce proceedings until after he obtained citizenship (R. 208-09). And witness Haberman testified that Munio Knoll had said upon one occasion that it was easy to secure entry into this country if you knew how (R. 160).

Another declaration of Munio Knoll, to the effect that upon returning to Chicago from New York one time he had found Marcel in bed with Maria and that Marcel jumped out of the window, was admitted against Munio alone (R. 99-101, 169-70). Yet that declaration, which was testified to by witnesses Ludmer and Haberman, was plainly coupled, as was intended, with the testimony of witness Ludmer to the effect that he had seen Marcel Lutwak in bed with a plaster cast on his arm just after the event Munio spoke about (R. 98). This testimony concerning Marcel's arm was admitted generally.

In connection with the evidence of this kind, which petitioners contend was after the termination of the conspiracy and not in furtherance of it, the trial court, insofar as it indicated any reasons for ruling it admissible, seemed to accept the government's view that it could be admitted under the charge in the indictment of a continuing conspiracy to conceal (R. 67-68, 280-81).

4. The question relating to the burden upon the government to prove the marriages invalid under the applicable foreign law and thus to prove the foreign law arises from the fact that although the three marriages under attack took place in Paris, France, nothing at all with respect to French law was introduced into evidence. When this problem was raised by defense counsel at the trial, the court ruled that it would assume the law of Paris, France to be the same as that of Chicago, Illinois (R. 189).

5. The objection that the court failed to advise the jury that where two marriages are shown the presumption is that the second is valid, in the absence of evidence show

ing that the first marriage was not dissolved, has to do with instruction No. 22 as offered by the government and given by the court (R. 339, 354). That instruction reads: "The marriage of a man and a woman where one of the parties thereto has a husband or wife by a prior marriage who is then living and undivorced is void."

Inasmuch as the only possible application of this instruction is to the uncertain marital status of Maria and Munio and their resulting capacity or incapacity to remarry, the facts in the record on that point, set out above, are important. Assuming that there is a presumption in favor of a second marriage, then with respect to the marriages of Munio to Bessie and of Marcel to Maria, both Munio and Maria would be regarded as possessing the capacity to remarry, even in the absence of any showing that they had been divorced. Such a presumption would put the burden on the government to show that Munio's and Maria's marriage had not been dissolved.

Instruction No. 22 was given over the specific objection that it failed to advise the jury of such a presumption (R. 304-05).

SUMMARY OF ARGUMENT.

I.

The last of the three aliens entered the United States on December 5, 1947. By that time all the misrepresentations, concealments, and false statements claimed to have been made by the various conspirators had occurred. Thus, since the objective of the conspiracy had been attained, the conspiracy terminated on that date. *Krulewitch v. United States*, 336 U. S. 440, 442 (1949). Acts and declarations of the conspirators subsequent to that date were therefore not admissible against absent co-conspirators, since not in furtherance of the conspiracy.

Nevertheless, a major portion of the proof in this case consisted of these acts and statements, and the trial court admitted such evidence on the theory that it was proper under the allegations of the indictment charging a continuing conspiracy to conceal the main conspiracy. But the admission of such acts and declarations in furtherance of a claimed subsidiary conspiracy to conceal was emphatically rejected by this Court in *Krulewitch v. United States*, 336 U. S. 440, 443-44 (1949). The fact that the conspiracy to conceal was not charged in the *Krulewitch* case but is charged here is a distinction without a difference.

The Court of Appeals, in upholding the admissibility of such evidence, held that it was properly admitted to show the intent of the conspirators. But, plainly, acts and declarations of one conspirator after the termination of the conspiracy, and therefore not in furtherance of it, can only show the intent of the person making them. They cannot possibly show the intent of others.

The decision of the Court of Appeals adds to the substantial perils inherent in the use of conspiracy indictments and widens the already broad conspiracy dragnet.

II.

In federal criminal cases the competency and privileges of witnesses are governed by the principles of the common law as interpreted in the light of reason and experience. In *Funk v. United States*, 290 U. S. 371 (1933), this Court held that the wife of a defendant in a federal criminal case was competent to testify on his behalf; the Court's opinion stated, however, that the wife's competency to testify against her husband was not involved.

Since the *Funk* case, Courts of Appeals for four circuits, in addition to the court below in this case, have passed upon the question of the wife's competency to testify against the husband in a criminal case. Three of them have ruled the wife incompetent, the most recent decision being *United States v. Walker*, 176 F. 2d 564 (C. A. 2d, 1949), cert. den. 338 U. S. 891 (1949).

Experience in the states shows that there has been no general acceptance of a rule abolishing the privilege and no trend in that direction. Only one state has adopted legislation abolishing the privilege since the *Funk* decision. In fact, the great majority of the states require the consent of either the defendant spouse or the witness spouse before the latter is permitted to testify against the former.

Interpretation of the common law in the light of reason likewise indicates that the privilege to prevent the testimony of a spouse should not be abolished. For, if the privilege were to be done away with, police and prosecuting officials might well make a general practice of interrogating husbands and wives and compelling them to in-

criminate one another. The contention that there has been a trend toward the loosening of marriage ties which would justify abolishing the privilege is not sound, for although the family as an economic unit has declined in importance, the significance of the husband and wife as an emotional, social, and cultural unit has increased.

III.

According to this Court's holding in *Miles v. United States*, 103 U. S. 304 (1881), a wife in a plural or fraudulent or otherwise invalid marriage can testify only when its character as such is established. But even when that character is shown by other evidence, the wife of such a marriage cannot testify with respect to the facts tending to show its character. For so long as the facts having to do with the claimed invalidity of the marriage are in dispute, the supposed wife, if permitted to testify as to facts tending to show it, is in effect testifying with regard to her own competency.

These principles of the *Miles* case were not followed in this case, for the trial court refused *voir dire* examinations to determine the competency of Bessie Osborne and Grace Klemtnier out of the presence of the jury. The court's view was that the validity of the marriages would be determined by the jury. But in allowing the wives to testify with regard to the circumstances of the marriages, the court permitted evidence to go to the jury with respect to the very issues which had to be determined in order to establish the wives' competency as witnesses. The Court of Appeals found nothing improper in this, despite the plain holding of *Miles v. United States*.

IV.

In this case the jury, under the instructions given by the trial court, was called upon to determine the validity of three marriages performed in Paris, France. Nonetheless, despite the clear principle that the validity of a marriage depends upon the law of the place where contracted, no evidence of French law was introduced by the government. By failing to prove the marriage law of France, the government failed to prove an essential element of the offense charged.

The trial court said that it would assume that the law of Paris, France is the same as that of Chicago, Illinois. The Court of Appeals ruled that in the absence of proof to the contrary the marriage laws of another country would be presumed to be the same as those of the forum, and that if the marriage laws of France were different from those of Illinois and the United States, the burden was upon the defendants to prove the differences and thus rebut the presumption that they were the same.

There is no general presumption that the law of France and that of the forum are similar, since the law of France is not based upon the common law. *Cuba R. Co. v. Crosby*, 222 U. S. 475, 479 (1912).

Furthermore, under the law of Illinois and most other states, a marriage entered into for the purpose of accomplishing some specific objective is valid, as contrasted to what is termed a marriage in jest. *DeVries v. DeVries*, 195 Ill. App. 4 (1915).

Once a marriage is shown, the law raises a strong presumption in favor of its validity. The government endeavored to overcome this presumption by relying upon another, i. e., the presumption as to the similarity of French law. But where presumptions conflict, the presumption in favor of innocence is to be applied.

V.

Where two marriages are shown the second is presumed to be valid, and the party attacking the second marriage must show that the first marriage has not been dissolved. *In re Estate of Dedmore*, 257 Ill. App. 519, 522 (1930). Nonetheless, the government obtained an instruction which advised the jury that "The marriage of a man and woman where one of the parties thereto has a husband or wife by a prior marriage who is then living and undivorced is void." Defense counsel objected to this instruction on the ground that it failed to inform the jury of the presumption in favor of the second marriage; they also pointed out that there was insufficient evidence in the record to justify the instruction.

This instruction was intended to refer to the marriage of Munio and Maria and to their subsequent marriages to Bessie Osborne and Marcel Lutwak respectively. The court thus advised the jury that if they found that the Munio Knoll-Maria marriage had not been dissolved by divorce, then they were bound to conclude that the Munio-Bessie Osborne and the Marcel Lutwak-Maria marriages were void by reason of Munio's and Maria's lack of capacity.

The Court of Appeals conceded that there was insufficient evidence in the record to determine what the Munio-Maria marital status was, for it said that whether there had been a legal divorce was not determinable from the record. Under the presumption in favor of the second marriage the burden was on the government to prove that the first marriage, *i. e.*, that of Munio and Maria, had not been dissolved. This the government failed to do.

ARGUMENT.

I.

Acts and Declarations of a Conspirator Are Not Admissible Against Absent Co-Conspirators When Not in Furtherance of the Conspiracy and After Its Termination. This Is True Even Where a Continuing Conspiracy to Conceal and Avoid Detection and Prosecution Is Expressly Charged, Especially Where No Proof Is Adduced as to Such an Agreement or Acts in Furtherance of It.

A.

Under the doctrine of *Krulewitch v. United States*, 336 U. S. 440 (1949), such acts and declarations are inadmissible.

The count of the indictment under which petitioners were found guilty charged, in substance, that they conspired (1) to make false and misleading representations and to conceal material facts in order to secure the entry into the United States of Munio Knoll and Leopold Knoll on November 13, 1947, and December 5, 1947, respectively; (2) to make false statements under oath on September 9, 1947, November 13, 1947, and December 5, 1947, in applications required by the Immigration Laws for the admission into the United States of Maria Lutwak, Munio Knoll and Leopold Knoll, respectively; and (3) to defraud the United States of its governmental functions of administering the Immigration Laws and the Immigration and Naturalization Service free from fraud, deceit, and misrepresentation.

The evidence conclusively demonstrated that the last of the allegedly fraudulent entries into the United States

occurred on December 5, 1947. By that time all misrepresentations, concealments, and false statements, if any, in furtherance of such entries had occurred. Accordingly, the conspiracy terminated on that date since its objective had been successfully attained. *Krulewitch v. United States*, 336 U. S. 440, 442 (1949); *Fiswick v. United States*, 329 U. S. 211, 216 (1946); *Brown v. United States*, 150 U. S. 93, 98 (1893); *United States v. Rubenstein*, 151 F. 2d 915, 917 (C. A. 2d, 1945).

Therefore, statements and acts of the conspirators after the last entry were not admissible against other defendants, not present, since not in furtherance of the conspiracy and not within the exception to the hearsay rule. *Fiswick v. United States*, 329 U. S. 211, 215, 216, 217 (1946); *Krulewitch v. United States*, 336 U. S. 440, 442, 443 (1949); *Logan v. United States*, 144 U. S. 263 (1892).

Nevertheless, a major portion of the proof in this case consisted of such acts and statements. In fact, only four of the government's eighteen witnesses testified to significant events occurring prior to the entries, and a large portion of their testimony concerned happenings occurring long after the conspiracy ended. The complained of testimony consisted largely of evidence to the effect that the parties to each marriage lived apart from each other (R. 65-66, 69, 135-137, 210, 250, 260); that the husband in one marriage lived and slept with the wife (his former wife) in another marriage (R. 69, 104, 105, 141, 143, 177), and took her to night clubs where they had pictures taken of themselves and others (Govt. Exs. 22, 23, 24, 25; R. 16, 61, 168, 169, 176, 178, 181-184, 280, 287).

The trial court admitted this evidence, over objection, against all petitioners (R. 67, 68, 140, 142) on the theory that it was proper to do so under allegations of the conspiracy count of the indictment that it was a further part

of the conspiracy that the "said defendants would at all times *subsequent to the formation of the said conspiracy conceal such transactions and acts aforesaid and would do such other, further and different acts as they might deem necessary and expedient to prevent the disclosure to the United States Immigration and Naturalization Service of the existence of said conspiracy*" (R. 7, 67, 68). (Emphasis added.)

The admission of acts and statements of a conspirator against absent co-conspirators in furtherance of a subsidiary conspiracy to conceal and avoid detection and prosecution was emphatically rejected by this Court in *Krulewitch v. United States*, 366 U. S. 440- (1949). In disposing of this question, this Court there said at pages 443-44:

This prerequisite to admissibility, that hearsay statements by some conspirators to be admissible against others must be made in furtherance of the conspiracy charged; has been scrupulously observed by federal courts. The Government now asks us to expand this narrow exception to the hearsay rule and hold admissible a declaration, not made in furtherance of the alleged criminal transportation conspiracy charged, *but made in furtherance of an alleged implied but uncharged conspiracy aimed at preventing detection and punishment*. No federal court case cited by the Government suggests so hospitable a reception to the use of hearsay evidence to convict in conspiracy cases. The Government contention does find support in some but not all of the state court opinions cited in the Government brief. But in none of them does there appear to be recognition of any such broad exception to the hearsay rule as that here urged. The rule contended for by the Government could have far-reaching results. *For under this rule plausible arguments could generally be made in conspiracy cases that most out-of-court statements offered in evidence tended to shield co-conspirators*. We are not persuaded to adopt the Government's implicit conspiracy theory which in all

criminal conspiracy cases would create automatically a further breach of the general rule against the admission of hearsay evidence. (Emphasis added.)

It is, of course, quite plain that this Court was there speaking of an "implied but uncharged" conspiracy, whereas the conspiracy to conceal in the case at bar was expressly pleaded as a further part of the conspiracy already charged. We respectfully submit, however, that the setting forth in the indictment here of what the government attempted to imply in the *Krulewitch* case makes for a distinction without a difference.

This becomes very clear in the light of the reasoning in the opinion in *Krulewitch* case. The evils of such a conspiracy, in addition to those already described, are: (1) there is no logical limit to such a conspiracy, either as to duration or means, (2) such a conspiracy, if it need not be proven, cannot be overcome by express or credible evidence and an accused would be unable to terminate the imputed agency of his associates to incriminate him, (3) an indefinitely continuing offense would result in an indeterminate extension of the Statute of Limitations, and (4) the recognition of such a conspiracy by the courts would create a new judge-made offense of doubtful constitutionality, even if it were created by Congress. Each of these evils results from creating a conspiracy to conceal, regardless of whether the conspiracy is charged or implied.

In the case at bar, the government made no effort to prove the conspiracy to conceal as charged, and produced no evidence indicating that such a conspiracy was carried out. In fact, the evidence demonstrated that petitioners talked to any and every one about the transactions they were allegedly covering up (e. g., R. 152, 153, 160). Further, no overt act in furtherance of such a conspiracy was set forth in the indictment.

In the *Krulewitch* case, this Court was concerned with the admission of a statement by which one of the defendants there actually attempted a concealment. As has been seen, this Court found such a statement inadmissible. Here, acts and statements which in no way could be construed as preventing a disclosure were admitted on the theory that they were in furtherance of a conspiracy to prevent such disclosure. *A fortiori* they are all inadmissible for all of the reasons set forth in the *Krulewitch* case.

In addition, and compounding the error, is the fact that the court admitted in evidence an admission against interest made by one of the petitioners prior to the last entry to the effect that "it is easy to come to the United States if you know how" (R. 160). This statement was admitted against all (R. 160) on the theory that it was in furtherance of the general conspiracy, the trial court stating that "an admission may be admissible against all parties to the conspiracy" (R. 159). Such an admission is not in furtherance of the conspiracy, and it is immaterial whether or not the conspiracy was still in existence or had been consummated or terminated. Such evidence is admissible only against the person making the statement. *United States v. Guido*, 161 F. 2d 492, 495 (C. A. 3d, 1947).

B.

Post conspiracy acts and declarations are not admissible on the question of the intent of absent co-conspirators.

The inadmissibility of these post-conspiracy acts and declarations under the *Krulewitch* case was briefed and argued by petitioners in the court below.

That court, without referring to the *Krulewitch* doctrine at all, shifted the reasons supporting the admission of such evidence and ruled that acts and declarations after

entry were admissible on the question of petitioners' intent to have performed valid marriages. In so ruling, the Court of Appeals stated (R. 399):

Complaint is made that the court permitted evidence of events in America subsequent to the entries. When we remember that this case turned almost entirely upon the question of the validity of the Parisian marriages and that whether they were valid, in turn, depended upon the intent of the parties at the time the ceremonies occurred, it is clear that not only what was said and done prior to the time of the marriages, but that the conduct of the parties and their statements after they returned to America were relevant and competent for the jury to consider in determining whether in fact they reflected an intent to have performed valid marriages or whether they tended to show that the intent was merely to pretend to be married.

It is conceded, of course, that the acts and declarations of a conspirator after the termination of a conspiracy are admissible against *him* to show *his* intent, but here the court below failed to perceive that the trial court had admitted this testimony against *all* the alleged conspirators, including those absent. The court below has thus broadened the law of admissibility in conspiracy cases by permitting post-conspiracy acts and declarations of a conspirator to be used against conspirators not present on the question of *their* intent.

Since acts and declarations after the termination of a conspiracy are not in furtherance of it, the decision of the court below, carried to its logical limits, opens up an avenue whereby even the confession and other admissions against interest of one conspirator would be admissible against others as bearing on their intent. The dangers inherent in the conspiracy charge have been effectively pointed out by this Court and other courts. *United States v. Krulewitch*,

366 U. S. 440 (1949); *United States v. Falcone*, 109 F. 2d 579, 581 (C. A. 2d 1940). The decision below adds to these perils and tears down and destroys historic barriers painstakingly erected by this Court against those who would widen the already broad conspiracy dragnet. *Fiswick v. United States*, 329 U. S. 211, 216, 217 (1946); *Logan v. United States*, 144 U. S. 263, 309 (1892); *Brown v. United States*, 150 U. S. 93, 98 (1893).

II.

Reason and Experience Both Require the Rule That in Federal Criminal Cases One Spouse Cannot Testify Against the Other Unless the Defendant Spouse Waives the Privilege.

In federal criminal cases the competency and privileges of witnesses are governed by the principles of the common law as interpreted by the courts of the United States in the light of reason and experience. This is the guide laid down by Rule 26 of the Federal Rules of Criminal Procedure.

At the trial, Maria, who had once been married to Munio Knoll and later to Marcel Lutwak, Bessie Osborne, who had gone through a marriage ceremony with Munio Knoll, and Grace Klemtner Knoll, who had gone through a marriage ceremony with Leopold Knoll, all testified over objection (R. 41-42, 56-57, 187, 225). The Court of Appeals, in its supplemental opinion, found a "modern trend of thought in this country" which justified the holding that "irrespective of all other questions, the wives were competent witnesses" (R. 412-13). It should be noted, however, that virtually all the cases cited by the court deal with crimes against the wife.

At common law a spouse was incompetent to testify either for or against the other spouse, except in cases involving a crime against the wife. This court, in *Funk v. United States*, 290 U. S. 371 (1933), determined that in a federal criminal case the wife of a defendant was competent to testify on his behalf. The opinion of this Court, however, pointed out that the competency of the wife to testify against her husband was not involved. 290 U. S. 371, 373 (1933).

Since the *Funk* case, experience with the latter question in the federal courts has resulted in decisions in three circuits holding that a spouse is incompetent. *Paul v. United States*, 79 F. 2d 561 (C. A. 3rd, 1935); *Brunner v. United States*, 168 F. 2d 281 (C. A. 6th, 1948); *United States v. Walker*, 176 F. 2d 564 (C. A. 2d, 1949), cert. den. 338 U. S. 891 (1949). One circuit has decided that the rule as to the spouse's incompetency is obsolete, *Yoder v. United States*, 80 F. 2d 665 (C. A. 10th, 1935), but as Judge Learned Hand observed in the *Walker* case, at page 568, that part of the *Yoder* opinion is dictum.

In the most recent of these Court of Appeals decisions, *United States v. Walker*, 176 F. 2d 564, 568 (C. A. 2d, 1949), the court wrote:

We conclude therefore that we should await the choice of Congress between the conflicting interests involved, or such an overwhelming general acceptance by the states of the abolition of the privilege, as induced the Supreme Court to action in *Funk v. United States*.

And as late as 1949, this Court in *Griffin v. United States*, 336 U. S. 705, 714 (1949) stated:

The Federal courts have held that one spouse cannot testify against the other unless the defendant spouse waives the privilege.

Moreover, experience in the state courts and legislatures, far from showing "an overwhelming general acceptance by the states of abolition of the privilege", indicates that only one state has abolished the privilege since the *Funk* case.

At this point a word about terminology is in order. The incompetency of one spouse to testify *for* the other spouse has been almost universally abolished. But what this Court in the *Funk* case called the competency of the wife to testify *against* her husband has been treated in different ways in different states. Thus some state statutes read in terms of whether the wife's testimony is *compellat'*, while some say she may not testify without the *consent* of her husband. In other states, statutes speak in terms of a privilege—a privilege which Wigmore calls a "privilege for anti-marital facts". Wigmore, *Evidence*, 3rd Ed. § 2227. It is clear that a statute conferring the privilege not to testify against one's wife or husband on both the witness spouse and the defendant spouse achieves the same result as a statute declaring that one spouse is incompetent to testify against the other. This privilege, of course, is to be distinguished from the privilege against the disclosure of confidential communications between husband and wife.

Experience in the States.

In each of the forty-eight states, there are statutes dealing with the competency and privileges of spouses. An attempt has been made, therefore, to classify those statutes in order to demonstrate that experience with this question in the states does not justify the abolition of the common law rule.

In the following twelve states the statutes read in terms of competency. Each of these statutes provides that one

spouse is not competent to testify against the other spouse in a criminal case.¹

Arkansas—(Ark. Stat. Ann., 1947, § 43-2019).

Georgia—(Code of Ga. Ann., Title 38-1604).

Iowa—(Ia. Code Ann., §§ 622.7).

Nebraska—(Revised Stat. of Neb., 1943, § 25-1203).

New Jersey—(N. J. Stat. Ann., 1937, §§ 2:97-4, 2:97-9).

New Mexico—(N.M. Stat. Ann., 1941, § 42-1220).

North Carolina—(Gen. Stat. of N. C., 1943, Ch. 8; Art. 7, § 8-57).

Ohio—(Pages Ohio Gen. Code Ann., § 13444-2).

Oklahoma—(Oklahoma Stat. Ann., Title 22, par. 702).

Pennsylvania—(Purdon Pa. Stat. Ann., Title 19, § 683).

Texas—(Vernon's Tex. Stat., Code of Crim. Procedure, par. 714).

Wyoming—(Wyo. Compiled Stat., 1945, Ann., 3-2605).

In eight states the statutes read in terms of consent. In these states the statutes provide that one spouse may not testify against the other in a criminal case unless *both spouses* consent.

California—(Deering's Calif. Penal Code, § 1322).

Idaho—(Idaho Code, 1948, Title 19-3002).

Mississippi—(Miss. Code Ann., 1942, par. 1689).

Montana—(Revised Code of Mont., 1947, Ann. § 94-8802).

Oregon—(Oregon Compiled Laws Ann., 1940, § 26-935).

Utah—(Utah Code Ann., 1943, §§ 105-1-10, 105-45-4).

Virginia—(Code of Va., 1950, §§ 8-287, 8-288).

West Virginia—(W. Va. Code of 1949 Ann., §§ 5727, 5728).

1. The latest available supplements to the statutes cited on pp. 34-36 have been checked. No amendments or changes have been found which modify any of the provisions referred to.

In nine states the statutes provide that a spouse may not testify against the other spouse without the consent of the *defendant spouse*. This rule is the same as that stated for the federal courts in *Griffin v. United States*, 336 U. S. 705, 714, 715 (1949).

Arizona—(Ariz. Code Ann., 1939, §§ 23-103, 44-2701).

Colorado—(1935 Colo. Stat. Ann., Ch. 177, par. 9).

Michigan—(Mich. Stat. Ann., § 27.916).

Minnesota—(Minn. Stat. Ann., § 595.02).

Missouri—(Mo. Revised Stat. Ann., § 4081).

Nevada—(Nev. Compiled Laws, 1929, par. 8971).

North Dakota—(N. D. Revised Code of 1943, § 31-0102).

South Dakota—(S. D. Code of 1939, § 36.0101).

Washington—(Remington's Revised Stat. of Wash. Ann., § 1214).

In seven states the statutes require the consent of the *witness spouse*. They provide that a spouse may not be *compelled* to testify against the other spouse.

Alabama—(Code of Ala. 1940, Title 15, § 311).

Connecticut—(General Stat. of Conn., Revision of 1949, Vol. 3, § 8800).

Kansas—(General Stat. of Kans. Ann., 1949, Ch. 62, Art. 142).

Kentucky—(Carrolls Ky. Code, par. 606).

Louisiana—(La. Rev. Stat. Code of Crim. Procedure, § 15:461).

Massachusetts—(Ann. Laws of Mass., 1933, Ch. 233, § 20).

Rhode Island—(General Laws of R. I., 1938//Ch. 537, § 17).

The remaining states have abolished the incompetency of the spouse and have retained by statute or by state

court decision only the privilege against disclosure of confidential communications between husband and wife.

Delaware—(Revised Code, Del., 1935, § 4691).

Florida—(Florida Stat. Ann., 1944, §§ 90.04, 932.31).

Illinois—(Ill. Revised Stat., 1951, Ch. 38, § 734).

Indiana—(Burns Indiana Stat. Ann., § 9-1603).

Maine—(Revised Stat. of Maine, 1944, § 22, page 1928).

Maryland—(Ann. Code of Maryland, 1951, Art. 35, § 4).

New Hampshire—(Revised Laws of N. H., 1942, § 29, page 1664).

New York—(McKinneys Consol. Laws of New York Ann., Penal Law § 2445).

South Carolina—(Code of Laws of S. C., 1942, par. 692(1)).

Tennessee—(Williams Tennessee Code Ann., 1934, § 9778).

Vermont—(Vermont Stat., 1947, Ch. 84, § 1738).

Wisconsin—(Wisconsin Stat., 1951, § 325.18).

In some of these states, however, this privilege includes, in addition to communications, facts learned by reason of the marriage relationship. Thus in New Hampshire and Vermont the statutes provide that the husband and wife are competent to testify for or against each other, except for communications or facts which would lead to a violation of marital confidence. In Florida, Indiana, New York, and Tennessee, the courts have interpreted the privilege to include facts observed by the spouse as a result of the marriage relationship. *Mercer v. State*, 40 Fla. 216 (1898); *Beyerline v. State*, 147 Ind. 125 (1897); *People v. Daghita*, 299 N. Y. 194 (1949); *McCormick v. State*, 186 S. W. 95 (Tenn. 1916).

Thus only in Delaware, Illinois, Maine, Maryland, South Carolina, and Wisconsin are both spouses permitted to

testify for or against each other, except for confidential communications.

The experience in the several states with respect to the testimony of one spouse against the other in a criminal case not involving a crime against the witness spouse may thus be summarized as follows:

1. Communications between husband and wife during coverture are privileged in virtually every state.
2. In at least forty-two states the consent of one spouse or the other is required before one may testify against the other with respect to facts learned as a result of the marital relation.
3. In at least thirty-six states the consent of one spouse or the other is required by statute before one may testify against the other at all.
4. In at least twenty-nine states the consent of the defendant spouse is required by statute before the other spouse may testify at all.

Moreover, of the six states which seem to have abolished the incompetency and privileges of spouses, except with respect to confidential communications, in only one, Illinois, has the statute been passed since the *Funk* case. In fact, in the group of ten states which have abolished the incompetency and privileges of spouses in criminal cases by statute, the last statute to be enacted, with the exception of Illinois, was passed in 1917. Most of these statutes were enacted prior to 1910. And in the seven states which confer the privilege on the witness spouse, not one of the statutes is subsequent to 1930.

Thus it appears not only that the majority of the statutes reflect the common law rule, but also that there has been no trend in modern times, and certainly no trend since the *Funk* case, which might conceivably lead to the conclusion that experience warrants changing the federal rule.

If experience were the sole criterion, therefore, there would be no justification for interpreting the common law other than as it has always been interpreted in federal criminal cases.

The decision in *Michelson v. United States*, 335 U. S. 469, 486 (1938), is applicable here. Although this Court regarded the rule there under consideration as "archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counter privilege to the other", it decided against changing the established rule. This Court said at page 487:

The confusion and error it would engender would seem too heavy a price to pay for an almost imperceptible logical improvement, if any, in a system which is justified, if at all, by accumulated judicial experience rather than abstract logic.

In the Light of Reason.

Interpretation of the common law in the light of reason requires the same conclusion with respect to the competency of spouses to testify against each other in criminal cases.

At work in the laboratories of the states are two social forces in conflict: the interest of the states in obtaining facts in criminal proceedings, and the special protection society affords to the marriage relationship. In every state, recognition is given to the close emotional ties between husband and wife and the need for mutual trust and confidence in that relationship, by protecting confidential communications between husband and wife from compulsory disclosure. This Court has afforded spouses that same protection in *United States v. Blau*, 340 U. S. 332, 334 (1951).

But the question in this case is whether, despite the experience of the states, reason requires the abolition of the privilege against the compulsory disclosure by one spouse of facts which may incriminate the other.

That the privilege against the compulsory disclosure of confidential communications and the privilege against the compulsory disclosure of incriminating facts rests upon the same foundations is clear. It is no less a betrayal of the husband for the wife to testify as to something he told her which may send him to jail, as it is for her to testify as to something he did which has the same result. This is well illustrated in *People v. Daghita*, 299 N. Y. 194 (1949), where the New York Court of Appeals held that confidential communication between husband and wife "includes knowledge derived from the observance of disclosive acts in the presence or view of one spouse by the other." The court held that a wife might not testify that she saw her husband bringing into the house articles identified by other witnesses as stolen property.

Should the privilege that now exists in the federal courts be abolished, the practice of questioning the spouses of suspects and of calling them before grand juries would become commonplace. This Court, having found it necessary to create safeguards against the use of coerced confessions, should recognize that the abolition of the spouse's privilege here may well encourage law enforcement officers to interrogate husbands and wives about each other in derogation of deep-rooted human instincts and sensibilities.

It is submitted, moreover, that it is insufficient to confer the privilege only upon the witness spouse. The practice of inducing accomplices to testify by offering immunity or light sentences is well known. On the record here, Grace Knoll, who was called as a court's witness because the gov-

ernment would not vouch for her credibility, had been indicted along with petitioners. Bessie Osborne and Maria Knoll were never indicted. Where the prosecution is able to place the wife in a position from which she may escape indictment only by testifying against her husband, the husband ought to be given the privilege of barring her from the witness stand lest the marriage relationship crack under the strain of the decision she must make if the privilege is hers.

In this case, the defendant spouses objected to the testimony of the wives. In addition, the record indicates that Maria and Grace were unwilling witnesses who testified only because compelled to do so. Thus Maria, immediately upon being called to the stand, unsuccessfully attempted to talk to the judge (R. 40). Grace, having been subpoenaed in California for the trial, was put on the stand as a court's witness. She stated that she believed she needed counsel, and declined to answer several questions for fear of possible self-incrimination (224-26, 240-42, 247, 264). Moreover, Grace had originally been indicted as a co-conspirator (R. 4-9); she was dismissed from the indictment because her constitutional rights had been infringed (R. 18, 224-25). Hence, regardless of whether this Court adopts a rule granting the privilege to the witness spouse or whether it retains the rule as it now exists, with the privilege in the defendant spouse, the decision below should be reversed.

A further point deserves this Court's consideration. What was once thought to constitute a trend toward the loosening of marriage ties, a trend arising in part from the emancipation of women, is no longer so considered by students of the family. The fact is that the family is no less important today than it was in 16th Century England. Admittedly, the family does not now perform the same economic functions it did three centuries ago. But with

the disappearance of the large family as an economic unit, the husband and wife have grown closer together as an emotional, social, and cultural unit. In totalitarian countries the claims of the state may be elevated to first position, but in the Western world at least the family unit has retained primacy.

III.

Where the Competency of a Witness Who is Prima Facie Incompetent Can Only Be Shown by Proof of a Contested Fact, It Is Error to Permit That Witness to Testify With Respect to the Very Issue Which Must Be Proved to Establish the Witness' Competency.

This is the rule announced in *Miles v. United States*, 103 U. S. 304 (1881), a case involving a prosecution for polygamy in the Territory of Utah. It was recently acknowledged to be the law in a decision of the Court of Appeals for the District of Columbia. *Matz v. United States*, 158 F. 2d 190 (App. D. C. 1946).

According to *Miles v. United States*, a wife in a plural or fraudulent or otherwise invalid marriage can testify only when its character as such is established. But the wife in such a marriage, even when its character is established, cannot testify with respect to the facts tending to show that character. For, clearly, so long as the facts having to do with the invalid character of the marriage are in dispute, the supposed wife, if she is permitted to testify concerning it, is in effect testifying with regard to her own competency.

As this Court said in the *Miles* case, 103 U. S. 304, 313-14:

The ground upon which a second wife is admitted as a witness against her husband, in a prosecution for bigamy, is that she is shown not to be a real wife by

proof of the fact that the accused had previously married another wife, who was still living and still his lawful wife. It is only in cases where the first marriage is not controverted, or has been duly established by other evidence, that the second wife is allowed to testify, and she can then be a witness to the second marriage, and not to the first.

The testimony of the second wife to prove the only controverted issue in the case, namely, the first marriage, cannot be given to the jury on the pretext that its purpose is to establish her competency. As her competency depends on proof of the first marriage, and that is the issue upon which the case turns, that issue must be established by other witnesses before the second wife is competent for any purpose. Even then she is not competent to prove the first marriage, for she cannot be admitted to prove a fact to the jury which must be established before she can testify at all.

Witnesses who are *prima facie* competent, but whose competency is disputed, are allowed to give evidence on their *voir dire* to the court upon some collateral issue, on which their competency depends, but the testimony of a witness who is *prima facie* incompetent cannot be given to the jury upon the very issue in the case, in order to establish his competency, and at the same time prove the issue.

The application of these principles to the case here is readily apparent. At the trial defense counsel asked for *voir dire* examinations in order that the competency of Bessie Osborne and Grace Klemtner could be determined out of the presence of the jury (R. 187-89, 225-26). The court refused, stating that it would allow the validity of the marriages to be determined by the jury (R. 41, 49, 56-57, 187-88, 224-26). In thereupon permitting the wives to testify with regard to the circumstances of the marriages, the court allowed evidence to go to the jury with respect to the very issues which had to be decided in

order to establish the wives' competency. Under the *Miles* case this was clearly error.

The Court of Appeals originally took the position that since the validity of the marriages was contested and was therefore a question of fact for the jury, and since the jury, by its verdicts of guilty, resolved that question by finding the marriages invalid, there were in fact no marriages and hence the rule as to the incompetency of wives did not arise (R. 397). In its supplemental opinion the Court of Appeals said that the trial court was justified in allowing the wives to testify in view of the *prima facie* showings of invalidity and thus to leave to the jury "the final determination of fact" (R. 413). But neither view can be squared with the *Miles* decision holding it to be error to permit the second wife to testify against the defendant as to *all* issues, including the issue of the prior undissolved marriage.

In this case, Bessie Osborne's testimony, a major portion of which related to the circumstances of her marriage to Munio Knoll (R. 190-210), upon which the government was relying to show the invalidity of that marriage, was clearly improper, since what Bessie had to say bore both upon the ultimate issues to be decided by the jury and also upon the issue determinative of her own competency. What is more, taking the Court of Appeals' initial formulation, the verdict of not guilty returned by the jury as to Leopold Knoll had the effect of upholding the validity of the Leopold-Grace marriage and necessarily, then, of rendering Grace incompetent. Much of Grace's testimony was plainly prejudicial to petitioners Treitler and Lutwak (R. 228-38, 242, 247).

IV.

The Validity of Marriages Performed in France is to Be Determined by French Law, and There is no Presumption That French Law is the Same as That of the Forum. By Failing to Prove the Law of France, the Government Failed to Prove an Essential Element of the Offense Charged. Further, if There be Such a Presumption, it Conflicts With and Yields to a Presumption in Favor of the Validity of Marriages Shown to Have Been Performed.

A.

The government had the burden of establishing the invalidity of the Parisian marriages. That burden could not be shifted by reliance on a non-existent presumption that French law and the law of the forum are the same.

The Court of Appeals recognized that "the contest in the trial court centered largely about these two factual questions, viz., did defendants conspire, and if so, did the government prove by competent evidence that the marriages were in fact invalid" (R. 392).

With respect to the latter question, no evidence was ever presented by the government that the marriages were invalid under French law. Instead the court below held that these marriages under the evidence presented were sham and void under the law of this country, because they had been entered into only for the sake of representing them as such to the outside world and with the understanding that they would terminate as soon as they had served their purpose (R. 396). The Court of Appeals ruled that it was not necessary for the government to prove the French law since "in the absence of proof to the contrary, the marriage laws of another state or country are pre-

sumed to be the same as the law obtaining in the forum, there is no presumption that the marriage laws of another state are different from the laws obtaining in the forum" (R. 414) and further that "if the French law differs from that of Illinois and the United States, it was defendants' duty to show that fact and thus rebut the presumption that it was the same" (R. 414).

The burden of proving each essential element of the offense beyond all reasonable doubt was upon the government, and that burden in a criminal case never shifts. *Lilienthal's Tobacco v. United States*, 97 U. S. 237 (1878); *Ezzard v. United States*, 7 F. 2d 808, 811 (C. A. 8th, 1925). Where problems comparable to those in this case have arisen in state criminal cases the prosecution has been required to sustain the burden of proving the foreign law invalid. *Commonwealth v. Stevens*, 196 Mass. 280 (1907); *State v. Henneman*, 40 N. M. 166 (1936). In addition, since marriages shown to have been celebrated as here (R. 60-62, 191-92, 245-46) are presumed to be valid, the burden is always on the party asserting invalidity to prove it. *Gaines v. City of New Orleans*, 73 U. S. 642 (1868); *Marris v. Sockey*, 170 F. 2d 599, 603 (C. A. 10th, 1948); *Mathews v. Jones*, 149 F. 2d 893, 894 (C. A. 5th, 1945). In so doing he must do so by full proof, which proof should be irrefragable. *Gaines v. Hennen*, 65 U. S. 553 (1861).

Under familiar principles of Conflict of Laws, such in-

1. The authorities cited by the court below in support of its ruling are singularly inapposite. Not one of them is a federal criminal case. Not one of them is a criminal case involving the law of a foreign country. Not one of them presumes that the marriage law of a foreign country is the same as that of the forum in the absence of proof by the party having the burden of proving what the foreign law is. Not one of them presumes that the marriage law of a foreign country is the same as that of the forum where such a presumption has the effect of invalidating a marriage, and not one of them involves the marriage law of a civil country.

validity is to be determined by the law of the place where the marriages were contracted. *Franzen v. E. I. Du Pont de Nemours & Co.*, 146 F. 2d 837, 839 (C. A. 3d, 1944); *Toshiko Inaba v. Nagle*, 36 F. 2d 481 (C. A. 9th, 1929). In this case, since the marriages took place in Paris, France, their validity should have been determined by French law. That law, not being subject to judicial notice, thus became a fact to be proven like any other fact. *Black Diamond S. S. Corp. v. Robert Stewart & Sons*, 336 U. S. 386, 396, 397 (1949). Petitioners so contended in the trial court (R. 189). That court, however, took the position that this was not necessary since it would assume, with respect to the question involved, that the law of "Paris, France, is the same as the law of Chicago, Illinois" (R. 189). This assumption was later dignified by the court below into the presumption by virtue of which that court relieved the government of its obligation to prove French law (R. 414).

There is, however, no such presumption as would here permit an inference that the law of France and of the forum are similar. This Court in the past has taken judicial notice (presumably on grounds of general knowledge) of the nature and bases of judicial systems of foreign countries, and where those systems are not based on the common law, this Court has held that there is no general presumption that that law is the same as the common or statute law of the forum. *Cuba R. Co. v. Crosby*, 222 U. S. 473, 479 (1912). This rule has been followed by the lower courts. *United States ex rel. Jelick v. District Director of Immigration*, 106 F. 2d 14, 20, 21 (C. A. 2d, 1939); *Bonsalem v. Byron S. S. Co.*, 50 F. 2d 114, 115 (C. A. 2d, 1931); *Ozanic v. United States*, 165 F. 2d 738, 744 (C. A. 2d, 1948). As is generally known, the law of France is founded on the Roman law and the Code Napoleon and not the common law. Hence, under the above rule, there is no presumption that the French law is the same as the

law of the forum. *Commissioner v. Hyde*, 82 F. 2d 174, 176 (C. A. 2d, 1936); *Barrielle v. Beltman*, 199 Fed. 838, 840 (C. A. 10th, 1912). The government has therefore failed to prove one of the essential issues in the case, i. e., the invalidity of the Parisian marriages.

B.

Even if, arguendo, there be such a presumption, the marriages were not void under the law of the forum.

The evidence, taken at its strongest for the government, indicated that the parties to the various marriages entered into them freely with a view to accomplishing the entry into the United States of the alien spouse in each marriage. Thereafter, they were to be terminated. Under the law of Illinois and most other states such marriages are not invalid. The majority rule is that where a man and woman have gone through a marriage ceremony for the purpose of accomplishing a definite object, but pursuant to an understanding that after the marriage has been performed each party would go his own way and one of them would later seek a divorce or an annulment, such a marriage is valid; and most courts have refused to give effect to the intent of the parties that the marriage should be merely a matter of form. *DeVries v. DeVries*, 195 Ill. App. 4 (1915); *Schidi v. Schidi*, 136 Conn. 196 (1949); *Hanson v. Hanson*, 287 Mass. 154 (1934); *Delfino v. Delfino*, 35 N. Y. S. 2d 693 (1942); *Erickson v. Erickson*, 48 N. Y. S. 2d 588 (1944); *Anonymous v. Anonymous*, 49 N. Y. S. 2d (1944); *Campbell v. Moore*, 189 S. C. 197 (1939); *Bove v. Pinciotti*, 46 Pa. D. & C. 159 (1942); *Wagner v. Wagner*, 59 Pa. D. & C. 90 (1947).

The court below apparently decided that the marriages were in jest (R. 396). In so doing it failed to distinguish

between the agreement to marry and the marriage contract itself. *DeVries v. DeVries*, 195 Ill. App. 4, 5 (1915). Thus, even though the parties may have decided that they would later terminate their marriages, nevertheless the two things essential to the validity of the marriages existed—capacity and consent.

C.

The presumption of similarity of French law to the law of the forum yields to the presumption that a marriage when shown to have been performed is valid.

Where a marriage has been shown in evidence as here, whether regular or irregular and whatever form the proof, the law raises a strong presumption of its validity. *Gaines v. Hennen*, 65 U. S. 553 (1861); *Freeman S. S. Co. v. Pillsbury*, 172 F. 2d 321, 323 (C. A. 9th, 1949); *Mathews v. Jones*, 149 F. 2d 893, 894 (C. A. 5th, 1945); *Marris v. Sockey*, 170 F. 2d 599, 603 (C. A. 10th, 1948); *Flynn v. Troesch*, 373 Ill. 275, 293 (1940); *Ertel v. Ertel*, 313 Ill. App. 326, 332 (1942).

As has been pointed out, the government attempted to overcome this presumption and the presumption of innocence by relying on another presumption, i.e., the presumption as to the similarity of French law to the law of the forum. Petitioner's presumption was in favor of their innocence and the government's in favor of their guilt. Under such circumstances, the former presumption is preferred and is to be applied. *Dalton v. United States*, 154 Fed. 461, 463 (C. A. 10th, 1907); cf. *Crude Oil Corp. of America v. C. I. R.*, 161 F. 2d 809, 810 (C. A. 10th, 1947).

To summarize the matter as plainly as possible, the rulings below (d) excused the government from proving what would otherwise be an essential fact, namely, the law of France with respect to the validity of the marriages in-

volved; (2) pronounced the law of France to be the same as that of Illinois; (3) placed upon the defendants the burden of showing any differences between French and Illinois marriage law.

This position was taken in the absence of any showing that it would be difficult or impossible for the government to be required to prove French law, and in fact the Assistant United States Attorney indicated that he had looked into the French law to some extent (R. 189). And most startling of all, the presumption was taken with respect to the laws of a country whose legal system has very little in common with our own. As the cases cited above indicate, the limits, even in civil cases, of permissible presumptions as to foreign law are quite narrow where a civil law country such as France is involved. The limits are even narrower when the question is something other than a routine one. See *E. Geli & Co. v. Cunard S. S. Co.* 48 F. 2d 115, 117 (C. A. 2d, 1931).

V.

Where Two Marriages Are Shown, the Second Is Presumed to Be Valid, and the Party Attacking the Second Marriage Must Show That the First Marriage Has Not Been Dissolved. Instruction No. 22, Offered by the Government and Given by the Court, Is Improper Because of Its Failure to Advise the Jury of Such a Presumption. What Is More the Evidence Does Not Support the Giving of the Instruction.

Inasmuch as Munio Knoll and Maria had been married in Poland in 1932 and subsequently went through marriage ceremonies with Bessie Osborne and Marcel Lutwak respectively, the question appeared to be posed as to Munio's and Maria's capacity to remarry. Although the

Assistant United States Attorney declined to indicate whether the government contended that Munio and Maria were never validly divorced and therefore lacked such capacity (R. 42), the government requested and obtained the following instruction: "The marriage of a man and woman where one of the parties thereto has a husband or wife by a prior marriage who is then living and undivorced, is void" (Instruction 22, R. 339, 354). In the Court of Appeals the government claimed that "at no time did the government assert the bigamous marriage theory" (Answer to Pet. for Rehearing, p. 15), although it apparently intends to rely upon it in this Court (Gov't Bf. in Opposition to Pet. for Certiorari, p. 24).

If this instruction was not intended to refer to the marriage of Munio and Maria and to their subsequent marriages to Bessie Osborne and Marcel respectively, it has no application to the case at all. Its plain effect was to instruct the jury that if they found that the Munio Knoll-Maria marriage had not been dissolved by divorce, then they were bound to conclude that the Munio-Bessie Osborne and the Marcel Lutwak-Maria marriages were void by reason of Munio's and Maria's lack of capacity.

At the trial, defense counsel objected to the offered instruction on the ground that first, there was no evidence to support it, particularly in view of the prosecutor's admission in his opening statement that there had been a rabbinical divorce between Munio and Maria, and on the further ground that second, it was contrary to law in that it failed to advise the jury of the presumption in favor of a second marriage. The trial court overruled these objections (R. 304-06). The Court of Appeals, while discussing at one point what it considered to be an insistence by petitioners that the jury should have been charged "that there is a presumption of validity of a marriage"

(R. 398)—something quite different from a presumption in favor of a second marriage where two are shown—did not consider these objections to the instruction as given.

Instead, the court below begged the question, stating that when “*validity is denied and attacked by affirmative evidence of invalidity, whether the presumptions have been overcome becomes a question of fact for the jury*” (R. 398). But the question raised by petitioners was whether or not Instruction 22 should have been given in the first place without giving recognition to the presumption that a second marriage is valid. The question was not what the jury could do with a presumption of validity once it had been told there was such a presumption. *Here the jury never was told of any such presumption. Hence, it was impossible for it to decide that the presumption had been overcome since it never knew in the first place that the presumption existed.*

With respect to the first contention on this point advanced by petitioners in the trial court, it would seem virtually to have been conceded by the Court of Appeals in its original opinion. Thus the Court of Appeals admitted that whether Maria “*had been legally divorced from . . . [Munio] is not determinable from the record*” (R. 393, fn. 1). But if that question is not determinable, then how could the jury be expected to pass on it and the other questions which instruction No. 22 put to them? In short, the government, by that instruction, asked the jury to conclude that Maria and Munio had not been divorced and hence could not validly remarry, but failed to place evidence in the record sufficient to reach a conclusion one way or the other. Nonetheless, the court ruled that “*the jury will have to determine what the situation is*” (R. 305).

It is elementary that an instruction to the jury must have some evidence in the record supporting it. Lacking

such evidence, the instruction does not assist the jury "in coming to correct conclusions, but its tendency is, to embarrass and mislead them. It may induce them to indulge in conjectures, instead of weighing the testimony." *United States v. Breitling*, 20 How. 252, 255, 15 L. Ed. 900, 902 (1858). Cf. *Meyer v. United States*, 258 Fed. 212, 216 (C. A. 7th, 1919); *Chambliss v. United States*, 218 Fed. 154, 157-58 (C. A. 8th, 1914).

With respect to petitioners' second contention, the law is settled that where two marriages are shown the second is presumed to be valid. The party attacking the second marriage must therefore rebut a strong initial presumption in favor of its validity. In Illinois the rule has been authoritatively expressed in *In re Estate of Dedmore*, 257 Ill. App. 519, 522 (1930), and *Potter v. Clapp*, 203 Ill. 592 (1903). Federal courts which have considered the problem have reached the same conclusion. *Walker v. United States*, 180 F. 2d 217, 219 (C. A. 7th, 1950), *Briggs v. United States*, 90 F. Supp. 135, 141-42 (Ct. Cl., 1950), *United States v. Green*, 98 Fed. 63 (C. C. Iowa, 1899), *Marris v. Sockey*, 170 F. 2d 599, 603 (C. A. 10th, 1948).

The decision perhaps most directly in point is *Prentis v. McCormick*, 23 F. 2d 802 (C. A. 6th, 1928). That was an appeal from a decision of the trial court discharging the appellee from arrest for supposed violations of the immigration laws. The petition pleaded appellee's entry into the United States from England in 1921 and her marriage later in that year to a United States citizen. If that marriage was valid, then, under existing law, appellee became a citizen and was not subject to deportation. The immigration authorities, by way of answer, alleged that the appellee had been previously married in England and had never been divorced or legally separated from her first husband. They also asserted that appellee had ad-

mitted committing the crime of bigamy prior to her entry into the United States.

Taking the facts as they appeared in the pleadings, the court affirmed the district court's finding that the appellee was entitled to discharge, and at page 803 it wrote:

She had gone through the form of marriage to an American citizen, a presumably legal marriage. That she had been married in 1911 to Avann and had never been divorced from him is also admitted; but those facts, in the absence of a showing that Avann was living when she married the second time, do not show the second marriage to have been bigamous, as against the formal ceremony thereof, in favor of which there is a presumption of validity.

These rules with respect to the presumption in favor of the second marriage and the burden upon the attacking party of overcoming that presumption were disregarded by the trial court. Both Munio and Maria were clearly alive. What was not clear was whether they had been legally divorced. That question necessarily depended upon evidence concerning the effect of a rabbinical divorce in Hungary in 1942 as between two Polish nationals who had been married in Poland in a ceremony performed by a Rabbi. The government presented no such evidence; and although the prosecutor prevented Maria from testifying with respect to the rabbinical divorce (R. 73, 78), he put that divorce squarely into the case by his opening statement (R. 23):

The Government expects to show and submits it will prove that in December, 1932, in Poland, the defendant Munio Knoll was married to this third alien who came into the United States, Marie Irene Knoll Lutwak; that in 1942, after having lived together for ten years as man and wife, these two persons obtained, during the war, what is known as a rabbinical divorce in Budapest * * *

The only evidence the government introduced as to the divorce was contained in Munio Knoll's statements to the immigration and naturalization authorities (Gov't Exs. Nos. 13 and 14, R. 281-82). No evidence of any nature was submitted to show that that divorce was ineffectual. Consequently, it is obvious from the record that the government did not present evidence sufficient to overcome the presumption in favor of the second marriage, a presumption which goes so far as to presume a divorce dissolving the first marriage even in the absence of any evidence of such a divorce. *In re Estate of Dedmore*, 257 Ill. App. 519, 522 (1930).

Thus the government secured an instruction on one of the crucial issues of the case—involving the validity of two of the three contested Paris marriages—in the absence of evidence to sustain it and in the face of a legal presumption directly applicable to the facts of record. The giving of such an instruction, over strenuous objection, was prejudicial error. That the instruction influenced the jury is apparent from the verdicts themselves: the one Paris marriage not touched by the instruction—that between Leopold Knoll and Grace—was the only one apparently regarded by the jury as valid, since Leopold was acquitted.

Conclusion.

The decision of the court below establishes startling changes in the law of evidence. If permitted to stand it will tear down and destroy historic evidentiary barriers, widen the already broad conspiracy dragnet, and obliterate protections inherent in the marital relationship which have existed continuously through many changing periods since the beginning of the common law. The destruction of these safeguards is not justified either by reason or by experience. Finally, its approval of the use of presumptions con-

flicts with firmly established principles governing the burden of proof in criminal cases and permits non-existent presumptions to take the place of facts essential to conviction.

This Court should emphatically disapprove this decision which in virtually all respects is patently erroneous.

We earnestly urge that the judgments below be reversed.

Respectfully submitted,

ANTHONY BRADLEY EBEN,

RICHARD F. WATT,

BERNARD WEISSBOURD,


Counsel for Petitioners.

JOSEPH L. NELLIS,

DUNNING, NELLIS & LUNDIN,

Of Counsel.

November 14, 1952.



LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.

FILED

DEC 8 1952

HAROLD B. WILLEY, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 66

**MARCEL MAX-LUTWAK, MUNIO KNOLL, AND
REGINA TREITLER,**

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

ANTHONY BRADLEY EBEN,

RICHARD F. WATT,

BERNARD WEISSBOURD,

Counsel for Petitioners.

JOSEPH L. NELLIS,

DUNNING, NELLIS & LUNDIN,

Of Counsel.

marriage. In particular, these materials indicate the growing realization that complete confidence and trust are essential not only to a sound marriage, but also to proper personality development.

A.

Munio Knoll Did Not Waive Objection to the Competency of Maria as a Witness. In Any Event, Under the Common Law the Incompetency of a Spouse Cannot Be Waived, and Proper Objection Was Made by a Co-defendant.

The government persists in the view that counsel for Munio Knoll made no objection to Maria's being called as a witness against him (Resp. Bf., p. 49).⁷ In light of the fact, however, that the government contends that the bigamous marriage instruction, Instruction No. 22 (R. 329), was properly given on the facts of this case (Resp. Bf., pp. 75-76), the government must take the position that the jury was asked to pass upon the validity or invalidity of the rabbinical divorce obtained by Munio and Maria in Budapest in 1942. As petitioners pointed out in their Brief in Answer to Brief for the United States in Opposition to the Petition for Writ of Certiorari, at pages 9-11, the government has blown hot and cold on this issue from the very beginning.

In any event, it was not necessary for Munio Knoll to make any kind of election at the time Maria was called to the stand. If this were not true, any defendant in a bigamy trial would immediately subject himself to charges of inconsistency if he interposed objection to the testimony of his alleged first wife. For this reason it is the accepted

7. Since the government has raised the issue of Munio's claimed failure to object to Maria as a witness, it is necessary for this Court to determine whether the rule as to adverse testimony of a spouse is one of *incompetency* or one of *privilege*. For if it is the former, there can be no waiver. The common law rule, which this Court is to interpret in the light of reason and experience has always been one of incompetency.

rule (that in such a trial the first wife cannot testify. In a bigamy trial the position of the prosecution obviously is, of course, that only the first marriage is a valid marriage. Here, in like manner, the position of the government was that Munio was still married to Maria; otherwise, as has been pointed out (Pet. Bf., p. 15), Instruction 22 (R. 329) had no purpose whatsoever.

The government's off-again, on-again handling of this obviously significant issue serves to highlight the claim that Munio expressly waived his *privilege* to object to Maria's testimony against him (Resp. Bf., p. 49). To be sure, at one point Munio Knoll's counsel stated that he did not wish to take advantage of the objection to Maria's competency (R. 52). The following morning, however, before Maria testified, counsel endeavored to indicate to the court the quandary in which his client was placed, an effort which the trial court cut off with a "Oh, objection overruled." Counsel promptly noted an "Exception" (R. 56-57). The circumstances of this exchange, put in the full context of the government's ambivalent attitude toward the "bigamous marriage theory" as it related to Munio and Maria, hardly justify the assertion that Munio expressly waived his *privilege*. On the contrary, since the government in this Court apparently wishes to take full advantage of what facts there are as to the questionable validity of the rabbinical divorce, the record ought not be read as showing a waiver.

In the absence of waiver, of course, Maria was competent to testify against Munio only if wives generally are competent to testify against husbands in criminal cases, for, since Maria's marriage to Munio was not controverted, the Court of Appeals' alternative position (R. 413) is inapplicable. This means, necessarily, that the broad question of competence is posed for decision and that the Court of Appeals' sweeping conclusion that the common law rule should be abolished in the light of reason and experience must be reviewed in deciding this case.

SUBJECT INDEX.

PAGE

| | |
|---|----|
| Preliminary Statement..... | 1 |
| Family Relationship of the Parties..... | 3 |
| Dates of Marriages and of Entries Into the United States | 3 |
| Argument: | |
| I. Post conspiracy acts are not relevant against co-conspirators (not present. The conspiracy charged here in the indictment terminated upon the last entry and hence such acts were inadmissible. Further, a shift in the grounds for admission into evidence of such acts is reversible error..... | 4 |
| A. Acts of one conspirator occurring after the termination of a conspiracy are irrelevant as to other conspirators not present when the acts took place. Even if relevant, reversal is here required since the grounds upon which such evidence was admitted in the trial court were different and much broader | 4 |
| B. The conspiracy charged terminated upon the achievement of the illegal purpose for which it was formed. That purpose was realized upon the last entry. Therefore acts performed thereafter were inadmissible against those petitioners not present..... | 9 |
| II. The adverse testimony of all three wives was improper and constitutes reversible error..... | 11 |
| A. Munio Knoll did not waive objection to the competency of Maria as a witness. In any event, under the common law the incompetency of a spouse cannot be waived, and proper objection was made by a co-defendant | 12 |
| B. The admission of Grace Klemtner's testimony was error, even though her husband, Leopold, was acquitted:..... | 14 |

| | | |
|-------------|--|----|
| C. | In order to justify a finding that the alleged marriages were mockeries, it would have been necessary for the court to make a preliminary determination of their validity under the applicable foreign law. This the court failed to do. Rather it employed the simple but unwarranted assumption that the law of France is the same as that of Illinois | 15 |
| III. | Where the issue to be determined by the jury coincides with the issue to be determined in establishing a witness' competency, it is improper for the trial court, after having determined that issue in such a fashion as to permit the witness to testify, to allow the witness to give testimony bearing on that very issue..... | 18 |
| IV. | The validity of the Parisian marriages was a central issue in the trial court and in the court of appeals. The government cannot now support a verdict on an unsound theory presented here for the first time..... | 22 |
| V. | On the facts of this case the bigamous marriage instruction was not proper. The evidence upon which the jury was asked to decide whether the rabbinical divorce of Maria and Munio was effective was wholly insufficient..... | 28 |
| Conclusion | | 31 |
| Appendix A: | The Laws of Foreign Countries Dealing With Testimony of One Spouse Against the Other in Criminal Cases..... | 33 |
| Appendix B: | Representative Modern Authorities Dealing with the Marriage Relationship..... | 38 |

TABLE OF CASES.

| | |
|--|-------------------|
| Barber v. The People, 203 Ill. 545 (1903)..... | 21 |
| Bates v. United States, 323 U. S. 15 (1944)..... | 28 |
| Brown v. United States, 150 U. S. 93 (1893)..... | 6 |
| Cole v. Arkansas, 333 U. S. 196 (1948)..... | 28 |
| Fiswick v. United States, 329 U. S. 211 (1946)..... | 6 |
| Funk v. United States, 290 U. S. 371 (1933)..... | 21 |
| Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229 (1917)..... | 6 |
| Hoxie v. State, 114 Ga. 19 (1901)..... | 20 |
| Krulewitch v. United States, 336 U. S. 440 (1949).... | 1, 4, 9 |
| Logan v. United States, 144 U. S. 263 (1892)..... | 6 |
| Lowery v. The People, 172 Ill. 466 (1898)..... | 20, 21 |
| Matz v. United States, 158 F. 2d 190 (App. D. C., 1946) | 21 |
| Miles v. United States, 103 U. S. 304 (1881)..... | 1, 18, 19, 20, 21 |
| Minner v. United States, 57 F. 2d 506 (C. A. 10th, 1932) | 8 |
| Minnich v. Gardner, 292 U. S. 48 (1934)..... | 28 |
| Pearson v. United States, 192 F. 2d 681 (C. A. 6th, 1951)..... | 28 |
| Pinkerton v. United States, 328 U. S. 640 (1946)..... | 6 |
| Regina v. Boucher, The Law Times, Vol. 214, Nov. 7, 1952, page 235..... | 14 |
| Rex v. Mount and Metcalf, 24 Crim. App. Rep. 135 (1934)..... | 14 |
| Shepard v. United States, 290 U. S. 96 (1933)..... | 8 |
| United States v. Gooding, 25 U. S. 460 (1827)..... | 6 |
| United States v. La Franca, 282 U. S. 568 (1931)..... | 28 |

| | |
|---|------|
| United States v. Liddy, 2 F. 2d 60 (E. D. Pa., 1924) .. | 14 |
| United States v. Rubenstein, 151 F. 2d 915 (C. A. 2d, 1945) | 5 |
| Wilson v. United States, 109 F. 2d 895 (C. A. 6th, 1940) | 7, 8 |

UNITED STATES STATUTES.

| | |
|-------------------------------|--------|
| Title 8, U. S. C. § 232 | 22, 23 |
|-------------------------------|--------|

MISCELLANEOUS.

Rule 26, Federal Rules of Criminal Procedure.

| | |
|---------------------------------------|----|
| 7 Am. Jur., Bigamy, § 51 | 30 |
| 14 Am. Jur., Criminal Law, § 63 | 6 |
| 14 A. L. R. 2d 614-15 | 17 |

624-25

IN THE
Supreme Court of the United States

OCTOBER TERM, 1952.

No. 66

MARCEL MAX LUTWAK, MUNIO KNOLL, AND
REGINA TREITLER,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

PRELIMINARY STATEMENT.

The Government's Brief, which we here seek to answer, is a masterpiece of avoidance of petitioners' arguments. By implication it confesses the validity of those arguments. The government has failed to respond to virtually every point raised by petitioners. Among other things, it has not answered our argument based on the decision of this Court in *Krulewitch v. United States*, 336 U. S. 440 (1949), it has refused to discuss, except in the briefest fashion, the

very important question bearing on the competency of spouses to testify, it has conceded the authority of *Miles v. United States*, 103 U. S. 340 (1881), yet lightly dismisses it as a forgotten decision, and it has not replied to our attack upon the non-existent presumption by which the court below and the trial court determined one of the most important issues in the case—the validity of the marriages under attack.

Instead, the government attempts to introduce new grounds sustaining the admission of evidence quite different from those asserted in the trial court. In addition, it has shifted away from the entire theory upon which the case was tried and then argued in the Court of Appeals. Because of the unresponsiveness of the government's Brief and the advancement of new arguments and theories, petitioners have been faced with entirely new problems. Within the limited time available for reply, we therefore have sought to demonstrate that the arguments and theories now relied upon by the government are as incorrect as those heretofore advanced by it in the lower courts.

Because the facts here involved are complicated, we have prepared for the assistance of the Court an explanatory chart appearing on the following page which reflects the relationships of the various parties to each other and the dates of the several marriages and entries into the United States.

1. FAMILY RELATIONSHIP OF THE PARTIES.

Munio Knoll, a petitioner.
 Leopold Knoll, acquitted.
 Regina Treitler, a petitioner.
 Marcel Lutwak, *their nephew*, a petitioner.

} *Brothers and Sister.*

2. DATES OF MARRIAGES AND ENTRIES INTO THE UNITED STATES.

Maria and Munio Knoll:

Married—Poland, 1932.

Divorced—Rabbinical—Budapest, 1942.

Maria Knoll and Marcel Lutwak:

Married—Paris, France, August 31, 1947.

Entry—September 9, 1947.

Divorced—Illinois, April, 1950.

Bessie Osborne and Munio Knoll:

Married—Paris, France, November 3, 1947.

Entry—November 13, 1947.

Divorce—pending in Illinois at time of trial.

Leopold Knoll and Grace Klemtner (dismissed from indictment prior to trial):

Married—Paris, France, November 6, 1947.

Entry—December 5, 1947.

ARGUMENT.

I.

POST CONSPIRACY ACTS ARE NOT RELEVANT AGAINST CO-CONSPIRATORS NOT PRESENT. THE CONSPIRACY CHARGED HERE IN THE INDICTMENT TERMINATED UPON THE LAST ENTRY AND HENCE SUCH ACTS WERE INADMISSIBLE. FURTHER, A SHIFT IN THE GROUNDS FOR ADMISSION INTO EVIDENCE OF SUCH ACTS IS REVERSIBLE ERROR.

The government contends that the case of *Krulewitch v. United States*, 336 U. S. 440 (1949) has no application to the case at bar. It takes this position in the face of the fact that the trial court here expressly admitted the evidence complained of under that part of the indictment charging a conspiracy (R. 6, 7, 67, 68), the nature of which was expressly condemned in the *Krulewitch* case by this Court. The government's failure to defend the grounds for admission relied on by the trial court and there urged by the prosecutor is eloquent evidence of its indefensibility and of the error here involved. Instead, the government attempts to justify the admission of this evidence on two other entirely different grounds, neither of which is sound. Even if, *arguendo*, such grounds were valid, the government's reliance on them now is reversible error, as is hereinafter shown (pp. 7-8).

A.

Acts of One Conspirator Occurring After the Termination of a Conspiracy Are Irrelevant as to Other Conspirators Not Present When the Acts Took Place. Even if Relevant, Reversal Is Here Required Since the Grounds Upon Which Such Evidence Was Admitted in the Trial Court Were Different and Much Broader.

The government first argues that post-conspiracy acts of certain petitioners (as distinct from their declarations) performed outside the presence of other petitioners have

a logical tendency (relevancy) to prove a material issue in the case at bar, *i. e.*, the intent of all petitioners (Resp. Bf., pp. 33, 36, 38, 41).¹

It then contends that any evidence which has a logical tendency to prove a material issue is admissible (Resp. Bf., p. 38, fn. 22) and, therefore, post-conspiracy acts of certain petitioners outside of the presence of other petitioners are admissible against all.

There is no such rule as that announced by the government, and the premise upon which it is based is fallacious, as is demonstrated hereinafter. Significantly, no authority or case in point is cited in its support.²

1. The government has summarized that which it believes to be material in this respect as "the nature and purposes of the marriages, the intentions of the parties with respect to the marriages, and the truth of the representations that they are husbands and wives who intended to live together * * *" (Resp. Bf., p. 24). Clearly, none of these issues could be determined or resolved without examining the intent of the parties.

In asserting that the issue as to the intent of the parties is material, the government has taken a position inconsistent with its contention (Resp. Bf., pp. 66-75) that the validity of the marriages is inconsequential.

2. The government relies on *United States v. Rubenstein*, 151 F. (2d) 915 (C. A. 2d 1945) as being squarely in point on this proposition (Resp. Bf., pp. 39-41). It is not. First, the objection to the admission of proof of a collusive divorce after entry and after the termination of the conspiracy was on the grounds that such proof was evidence of an independent and disconnected conspiracy (p. 917). Secondly, that evidence was admitted, not on the defendant's intent, but to corroborate the testimony of the spouses as to what they had originally intended and agreed upon (p. 917). In the case at bar, three marriages, not one, were involved, and acts of all six parties to the marriages after entry were admitted generally (for another and entirely different purpose) although only one party testified adversely on the question of intent as to one marriage. For argument that there is considerable doubt as to whether the Second Circuit would still follow this decision, see our discussion, pp. 12-13, Petition for Certiorari.

Reliance by the government on Professor Morgan (Resp. Bf., p. 37) is also misplaced, and the quotation referred to is completely out of context. Actually, the problem there discussed was whether or not the act of a conspirator is admissible against a co-conspirator when that which would make it competent, *i. e.*, the conspiracy, is an ultimate fact for the jury's ascertainment. Under such circumstances both the act and the ultimate question properly go to the jury if the act is relevant. The government has here begged the question.

The government, nevertheless, takes this position although it must be aware that this Court on numerous occasions has taken a position directly opposing and has stated that such post-conspiracy acts are inadmissible. *Brown v. United States*, 150 U. S. 93, 98 (1893); *Logan v. United States*, 144 U. S. 263, 309 (1892); *Fiswick v. United States*, 329 U. S. 211, 217 (1946).

The government's main error lies in its failure to recognize the elementary principle that generally a person is not bound by nor made criminally responsible for the acts of others. This is plain logic and is based upon the obvious reason that one cannot be responsible for that with which he has no connection or which is not within his dominion or control. 14 Am. Jur., Criminal Law, § 63.

Under such circumstances, there being no such connection, the acts of one have no probative force or legal tendency to prove anything material against another. Such acts are, therefore, as to the other irrelevant.

In those cases where this Court has approved the admission of the acts of one against another, it has impliedly recognized the validity of these principles. Accordingly, this Court has always made the admission of such evidence dependent upon a criminal agency relationship—never relevancy. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 249, 250 (1917); *United States v. Gooding*, 25 U. S. 460, 469 (1827); *Pinkerton v. United States*, 328 U. S. 640, 646 (1946).

Applying this reasoning to the case at bar, it is evident that the acts of each party to each marriage had no probative force which would prove any material issue against any other petitioner not present unless such a criminal agency was made to appear. In that event, acts by one would be admissible against all since deemed to be authorized by all parties to the partnership in crime. However

when the objective of such a partnership is attained or abandoned, the agency of one to bind the others terminates. Acts done thereafter by any of petitioners thus would have no probative force against other petitioners not present, since the authority to act on their behalf, which gave such acts probative force, has ceased. Thus, evidence as to such acts is irrelevant and inadmissible as to others under the rule stated above. (We concede, *arguendo*, that such acts are admissible on the intent of those actually performing them, if relevant and competent.)

Furthermore, we point out that even if evidence of post-conspiracy acts of some of the conspirators are held to be relevant on the question of all petitioners' intent, a reversal is still required since such was not the basis for the admission of these acts in the trial court. As we have previously pointed out (Pet. Bf., pp. 26-27), the trial court admitted the acts complained of on the theory that it was proper to do so as proof of that part of the indictment charging a conspiracy to conceal and to prevent disclosure of the main conspiracy (R. 6, 7, 67, 68, 140, 142).³

The reason for admitting such evidence was stated by the court in the presence of the jury (R. 67). It follows that it was considered by them for the broad purpose for which it was admitted. If this evidence was admissible on the narrower grounds now urged by the government as a second thought, petitioners quite clearly would have been entitled to an instruction limiting the evidence to the question of their intent.⁴ *Wilson v. United States*, 109 F. 2d

3. In fact the trial court was inclined under this theory to admit against all defendants individual statements given by them to officials of the Immigration Service, approximately a year after entry, but did not do so (R. 281).

4. If, as we have conceded for the purposes of the argument, acts of some of the conspirators were admissible on the question of their intent, the others would have been entitled to an instruction to that effect, limiting such proof to those against whom it was relevant.

895, 896 (C. A. 6th, 1940); *Minner v. United States*, 57 F. 2d 506, 510, 511 (C. A. 10th, 1932).

However, no such grounds for admission was urged by the government in the trial court. Therefore, at the conclusion of the government's case, petitioners had a right to rely on the *Krilewitch* case as controlling on the admission of this evidence and to conclude that reversible error was in the record. (As pointed out above, the government's refusal to join on this issue indicates the correctness of petitioners' view.) Hence, their decision to offer no evidence on their own behalf was justified (R. 289). As was pointed out in *Shepard v. United States*, 290 U. S. 96, 103 (1933), the action of the trial court and the government put petitioners completely off guard if the government's view here prevails. This alone would require a reversal here, since, as stated in the *Shepard* case, at p. 103:

A trial becomes unfair if testimony thus accepted may be used in an appellate court as though admitted for a different purpose, unavowed and unsuspected.

The government is inclined to minimize petitioners' reliance on a damaging declaration not in furtherance of the conspiracy made by one of the petitioners (R. 160) in November or December, 1947 (R. 154, 155). (Resp. Bf., pp. 34-35). The admission of this declaration as well as certain photographs (Gov't Ex. 22, 23, 24, 25) taken of some of the petitioners in night clubs has been argued (Pet. Bf., pp. 26, 29). We do not desire the Court to understand that by the above arguments, addressed to acts alone, we have abandoned our objections to that declaration and the pictures.

Further, we take exception to the government's statement that this declaration was restricted to the petitioner uttering it. The contrary appears (R. 155-60). The government's statement (Resp. Bf., p. 34, fn. 18) that the trial court limited this declaration to the petitioner making it

(R. 174) is wrong. The declaration thus limited was one made in June 1948 (R. 172). This ruling is indicative of the error affecting the admission generally of the earlier 1947 declaration. It also indicates the inconsistency of the trial court in this respect.

We conclude by pointing out that the government has offered no argument which would justify the general admission into evidence of the photographs of certain of petitioners in night clubs long after the aliens' entries.

B.

The Conspiracy Charged Terminated Upon the Achievement of the Illegal Purpose for Which It was Formed. That Purpose Was Realized Upon the Last Entry. Therefore Acts Performed Thereafter Were Inadmissible Against Those Petitioners Not Present.

The government argues secondly that the acts to which petitioners object were admissible in any event, since they were in furtherance of the principal conspiracy charged and were committed prior to its termination (Resp. Bf., pp. 42-47). This, too, represents a shift in position from the grounds upon which this evidence was admitted by the trial court:

The government alleges that this continuity of the conspiracy is found in that part of the indictment which charges petitioners with conspiring to (1) conceal their fraud and (2) arrange that the spouses would live apart and obtain divorces (Resp. Bf., p. 44). We here deal only with the latter⁵ in order to demonstrate that the conspiracy terminated on December 5, 1947.

5. With respect to the conspiracy to conceal, we have already pointed out that such a theory will not, under *Krulewitch v. United States*, 336 U. S. 440 (1949), support the admission of what would ordinarily be post-conspiracy acts (Pet. Bf., pp. 25-29).

An examination of the indictment indicates that the conspiracy count is in two sections. The first charges the conspiracy to commit the offenses charged in the substantive counts and to defraud the government of its functions. The second part is descriptive of the means by which the conspiracy was to be carried out. The substantive offenses charged the petitioners with making misrepresentations to, and concealing material facts from, immigration officers of the United States on the dates of the aliens' entries into the United States.

The charging part of the indictment makes clear that petitioners were alleged to be a combination to accomplish an unlawful or criminal act. That unlawful act, insofar as here pertinent, was to commit the substantive offenses, *i. e.*, the illegal entries by the means described. Upon those entries the criminal purpose had been accomplished, nothing further of an illegal nature remained to be done, and hence the conspiracy then terminated (Pet. Bf., p. 26). Acts thereafter done by any petitioner were not therefore admissible against others not present.

Subsequent acts might properly constitute evidence against those performing them as to their misrepresentations or concealments. Hence the government could still prove its case. But these acts—not being illegal in themselves—could not be the end-all of a conspiracy to commit an illegal act or acts.

We point out that the government's theory would here, as in the *Krulewitch* case, suspend indefinitely the operation of the Statute of Limitations, since, if it was part of the conspiracy for Munio and Maria to live together again, the crime would never be complete so long as they continued to do so.

In conclusion, we point out that the first rule contended for by the government does violence to recognized princi-

ples governing the admission of acts of one conspirator against another. The second rule would extend beyond all reasonable lengths and past the successful completion of the conspiracy the responsibility of one for the acts of another.

II.

THE ADVERSE TESTIMONY OF ALL THREE WIVES WAS IMPROPER AND CONSTITUTES REVERSIBLE ERROR.

In its Brief the government makes no real effort to support the view of the court below that in the light of reason and experience the rule as to the incompetency of a spouse to testify against the other spouse in a criminal case should be abolished. In the government's view the question is not reached, even though the court below in its second opinion preferred to rest its decision on that ground (R. 405-13). Because this question, despite the government's reluctance to discuss it, is one of great importance in the administration of the criminal laws, and because under Rule 26 of the Rules of Criminal Procedure this Court may resolve it in the light of reason and experience, petitioners believe that a full discussion of the appropriate considerations is both warranted and necessary.

At this time, however, petitioners wish only to call the Court's attention to certain additional materials not included in their original brief. Thus in Appendix A the laws of certain foreign countries dealing with testimony by one spouse against the other in criminal cases are classified and summarized.⁶ In Appendix B are listed certain source materials which are representative of contemporary thinking on the role, function, and nature of

6. Petitioners' counsel wish to express their indebtedness to the Comparative Law Center of the University of Chicago Law School for its cooperation in making possible a study of the foreign materials cited in this Brief.

It is worth noting that, despite the government's contention that the privilege is personal to the spouse against whom the testimony is offered, the common law rule, where *incompetency* is the basis of the exclusionary provision, is that adverse testimony by a spouse constitutes error even in the absence of any objection by the defendant. Under the rule that a wife is *incompetent* to testify against her husband, it makes no difference whether or not the husband raised timely objection. For a recent expression of this view, see *Regina v. Boucher*, The Law Times, Vol. 214, Nov. 7, 1952, page 235. Cf. *Barber v. The People*, 203 Ill. 543, 547 (1903).⁹

In addition, it is undisputed that one of Munio Knoll's co-defendants did interpose an objection to Maria as a witness (R. 41). See *United States v. Liddy*, 2 F. 2d 60 (E. D. Pa. 1924).

B.

The Admission of Grace Klemtner's Testimony Was Error, Even Though Her Husband, Leopold, Was Acquitted.

The government suggests that Leopold's acquittal may render academic the question of Grace's testimony (Resp. Bf., p. 50). This is not so, however, inasmuch as the rule is that where several defendants are on trial the spouse of one of them cannot be called as a witness against any of them. *United States v. Liddy*, 2 F. 2d 60 (E. D. Pa. 1924). See also the English decision, *Rex v. Mount and Metcalf*, 24 Crim. App. Rep. 135 (1934). The importance of this rule in conspiracy cases is obvious. Were it not the rule the prosecution could call A's wife to testify against B and C, B's wife to testify against A and C, and C's wife to testify against A and B. Necessarily, the effect of the testimony of a wife in such circumstances would be to incriminate her husband, even though the prosecution took care to have her testimony phrased so that it affected directly only the husband's alleged co-conspirators.

We also point out that the acquittal did not deprive the jury from considering Leopold's and Grace's actions as part of the over-all conspiracy charged.

C.

In Order to Justify a Finding That the Alleged Marriages Were Mockeries, It Would Have Been Necessary for the Court to Make a Preliminary Determination of Their Validity Under the Applicable Foreign Law. This the Court Failed To Do. Rather It Employed the Simple But Unwarranted Assumption That the Law of France Is the Same as That of Illinois.

The government takes the position that, at the time the court was called upon to rule as to the competency of Bess Osborne and Grace Klemtner, the record was sufficient to justify the court in concluding that the marriages were mockeries and shams (Resp. Bf., pp. 50-51). The government does not assert, however, that this means that the judge determined the marriages were invalid for all purposes but only that they were invalid for purposes of invoking the privilege. Thus the government states that "the purported marriage upon which the claim of privilege was predicated was, in every sense which bears in any significant way on the availability of the privilege, no marriage at all" (Resp. Bf., p. 53). From this it follows, according to the government's argument, that it makes no difference whether the Parisian marriages were in some sense valid, since the privilege the defendants sought to assert derives from American law and was invoked in an American court (Resp. Bf., p. 54). Surely, however, the government does not mean seriously to suggest that persons married in foreign countries, when tried in American courts, have less right to assert the privilege than

defendants who, acting on the advice of foresighted counsel, took care to be married in the United States.

The difficulty with the government's view is that the trial court was obviously ruling that enough evidence had been presented to make it a question as to whether or not there was a valid marriage. Thus the court stated, with respect to the competency of Bessie Osborne, that "There has been plenty of testimony here which certainly makes it a question of fact as to whether this woman is the wife of Munio Knoll" (R. 187). When it was pointed out to the court that the validity of the marriage, which took place in France, would have to be determined under French law, the court indicated that he would assume that "The law of Paris, France, is the same as the law of Chicago, Illinois, with respect to people going through something that is a mockery, which they did not intend to be a marriage." And further that "the law of France, if it is pertinent, is the same as in Illinois, that if people go through a mockery, it is not a marriage" (R. 189).

Plainly, the court was not ruling whether or not the marriage was the kind of marriage which justified invoking the privilege. Rather the court was ruling that the evidence indicated that there was no marriage, and in order to make that ruling the court assumed that the French law and the law of the forum were identical in that both considered null marriages such as the facts here, in the opinion of the court, indicated. Elsewhere the government, conceding that the court did so rule, writes that the particular problem in this case is one "*where an alleged wife has been found by the judge not to be a wife and she is therefore permitted to testify * * **" (Emphasis added.) (Resp. Bf., p. 61.)

The rule, as it has been enunciated for generations, is that the husband or wife of a defendant is incompetent as

an adverse witness; or, as it has been expressed in some statutes, the spouse of a defendant may not testify against him in a criminal case without the defendant's consent. The rule is an exclusionary rule, and it applies wherever there is a valid marriage. There is nothing in the authorities to suggest, as the government does, that a valid marriage may nonetheless not constitute a sufficient basis for invoking the privilege, if, for example, the parties do not live together or are found to be incompatible or openly hostile to one another.

Since this is the rule, the trial court, in making its preliminary determination, had to decide a question, which involved a subsidiary question of law, based upon the evidence before it. The question was, did the facts in the record justify a conclusion that the marriages were invalid. Since the rule is universal that the validity of the marriage is determined by the law of the place where the marriage is contracted, the trial court had to give consideration to the law of France. Since the government made no effort to prove the law of France, *despite its burden of proof*, the court assumed it and found that under that assumed law these marriages were invalid.

What Judge Learned Hand wrote in *United States v. Rubenstein*, 151 F. 2d 915 (C. A. 2d 1945), relied upon here by the government (Resp. Bf., pp. 53-54) may be true as to the law of New Jersey, but it is definitely not true universally that a marriage in jest is not a marriage at all.⁸ What is more, it is obvious here that these were not marriages in jest, but rather, if the government's evidence is to be believed, particular purpose or limited purpose marriages.⁹ As petitioners pointed out (Pet. Bf., pp. 47-48), American law recognizes a distinction between a marriage in jest and a particular purpose or limited purpose mar-

8. See *infra.*, p. 23, fn. 11.

9. See 14 A. L. R. 2d 614-15.

riage. The view has wide acceptance that while the marriage in jest is void, the limited purpose marriage is not.

III.

WHERE THE ISSUE TO BE DETERMINED BY THE JURY COINCIDES WITH THE ISSUE TO BE DETERMINED IN ESTABLISHING A WITNESS'S COMPETENCY, IT IS IMPROPER FOR THE TRIAL COURT, AFTER HAVING DETERMINED THAT ISSUE IN SUCH A FASHION AS TO PERMIT THE WITNESS TO TESTIFY, TO ALLOW THE WITNESS TO GIVE TESTIMONY BEARING ON THAT VERY ISSUE.

The government virtually concedes that this is the rule of *Miles v. United States*, 103 U. S. 304 (1881). The government argues, however, that the rule makes no sense and that in any event there are possible distinctions between this case and the *Miles* case.

A close reading of the *Miles* case indicates, however, contrary to the contentions made by the government, that the trial court clearly ruled on the competency of the witness Caroline Owens, the second wife. The Court states, at page 308:

The defendant, therefore, objected to the introduction of Caroline Owens as a witness against him, the objection being based on the statute just quoted.

The court overruled the objection and admitted her as a witness. * * *

Thus it is apparent that the defendant sought to prevent Caroline Owens from testifying against him on the ground that she was his wife, and that the trial court ruled against the defendant and allowed Caroline Owens to testify. The only proper basis for such a ruling was that sufficient evidence had been introduced to indicate a prior subsisting marriage, namely the defendant's marriage to

Emily Spencer. As the wife in an invalid marriage, Caroline Owens would obviously have been a competent witness.

The ruling of the *Miles* case is that it was ~~error~~ for Caroline Owens, even though a competent witness for some purposes, to give testimony tending to prove the marriage of the defendant to Emily Spencer, the first wife. Even if this Court had been of the opinion that the trial court had not adequately made a preliminary ruling on the issue of competency, that fact would not alter the emphatic language of the Court holding that the admission into evidence of Caroline Owens' testimony as to the defendant's first marriage was error.

The government says that if that is the rule in the *Miles* case it has no basis in reason. Closer analysis indicates, however, that there is a very sound reason for the rule. The problem arises, as in the *Miles* case and here, where fact "A" must be established in order to determine that a witness is competent. "A" is also a key issue, perhaps the sole issue, to be found by the jury, and a verdict of guilt necessarily must rest upon a finding of "A". Where the witness is found competent by the court, that finding means, and having heard the objection to the witness's competency the jury could not help but realize that it means, that the judge had made a finding of "A". Otherwise, he could not have permitted the witness to testify. When the witness thereupon takes the stand and testifies as to "A", the witness is doing so under circumstances in which the jury realizes that the judge has already found "A". Frequently, too, the court will have found "A" primarily on the basis of the witness's own recitation to the court on *voir dire* of the facts tending to show "A".

In this case, as well as in the *Miles* case, permitting the spouse to testify as to the facts showing the invalidity of her marriage, which facts were basic to a ruling that she

was competent, put before the jury crucial testimony as to the key issue in the case which the members of the jury could not help but evaluate in light of their realization that the judge had already heard those facts and had found them sufficient to conclude that the marriage was invalid.

It is this coincidence between the primary issue for the judge and the ultimate issue for the jury which justifies the rule in the *Miles* case. It is the lack of such coincidence, moreover, which makes the decision of the Supreme Court of Georgia in *Hoxie v. State*, 114 Ga. 19 (1901), irrelevant (Resp. Bf., p. 61). In the *Hoxie* case, where the defendant was accused of murder, a woman was called to testify against him over objection that she was his wife and therefore not competent. She was permitted to testify, however, and stated to the jury, over objection, that she was not the wife of the defendant.¹⁰ Obviously her statement that she was not the defendant's wife did not bear directly upon the ultimate issue to be decided by the jury, since the innocence or guilt of the defendant did not depend upon a finding that the witness either was or was not his wife. Since coincidence was lacking in the *Hoxie* case, the jury did not hear evidence on the principal issue which the court's ruling on the witness's competency, assuming it made such a ruling, would necessarily indicate to the jury was convincing and sufficient.

It is not surprising that the *Miles* case has not had a busy career in the federal courts. Problems of the kind dealt with in the *Miles* case, of course, have been primarily concerns of the states, and the *Miles* case has been followed in state opinions. See, e. g., *Lowery v. The People*,

10. Apparently the trial court allowed the jury to decide the woman's competency as a witness. But as the government never tires of pointing out, the ruling as to competency is for the judge alone.

172 Ill. 466, 471 (1898); *Barber v. The People*, 203 Ill. 543, 548 (1903), where it is cited for the rule for which petitioners here contend.

It is beside the point to contend, as the government does (*Resp. Bf.*, pp. 64-65), that one of the reasons for the *Miles* decision is the fact that the spouse was incompetent either as a witness for the defendant or as a witness against him. For the incompetency of the spouse to testify against is not dependent upon or necessarily related to the incompetency of the spouse to testify for the defendant. See *Funk v. United States*, 290 U. S. 371 (1933). What the defendant objected to in the *Miles* case was that the testimony of the second wife was adverse as to a matter which coincided with the facts determinative of the second wife's competency. The circumstance that at the time of the *Miles* case the spouse was likewise incompetent to testify for the defendant has no real bearing upon the outcome of the case or this Court's reasoning.

In *Matz v. United States*, 158 F. 2d 190 (D. C. App. 1946), which cites the *Miles* case, the second wife did not testify as to any fact tending to establish the first marriage. She testified only that she had met the first wife, whom she had thought was the defendant's sister, and that she had seen the first wife in the courthouse on that day. Obviously that testimony did not coincide in any respect with the question the court had decided in determining that the second wife was competent, and nothing in that testimony had any direct bearing upon the ultimate issue of whether or not the defendant had committed bigamy.

IV.

THE VALIDITY OF THE PARISIAN MARRIAGES WAS A CENTRAL ISSUE IN THE TRIAL COURT AND IN THE COURT OF APPEALS. THE GOVERNMENT CANNOT NOW SUPPORT A VERDICT ON AN UNSOUND THEORY PRESENTED HERE FOR THE FIRST TIME.

Respondent again refuses to support or justify the theory upon which both the court below and the trial court found these marriages invalid. It has avoided petitioners' argument (Pet. Bf., pp. 44-47) that the law of France governs the marriages, that there is no presumption that French law is the same as that of the forum, and that the burden was on the government to prove the French law. Instead, it argues that whether or not the parties were validly married under French law is immaterial since the crime they were charged with was that of conspiring to "misrepresent the aliens as 'spouses' within the War Brides Act" (Resp. Bf., p. 67).

There are two things wrong with this argument. First, in passing the War Brides Act, Congress did not pass a marriage statute. The word "spouse" in the Act must be interpreted under the laws of the country in which any particular marriage was contracted. Second, the government's argument overlooks completely what the indictment and trial were all about. No matter what the government would like to make of them in this Court, the indictment and trial, and the argument in the Court of Appeals as well, rested upon the assumption that the government had to show that the marriages were void in order to obtain convictions.

The War Brides Act, Title 8, U. S. Code, Section 232, provides for the admission into the United States of

alien spouses or alien children of United States citizens

serving in, or having an honorable discharge certificate from the armed forces of the United States during the Second World War.

Who is a spouse within this section is a question which necessarily must be decided in the light of the law applicable to the marriage from which the status of spouse is derived. There is no such thing as a spouse, *i. e.*, a status having definite legal significance, apart from some law, and the universal rule is that the law to be applied in determining the status as spouse (and necessarily the validity of the marriage from which the status of spouse is claimed) is the law of the country or state where the marriage was contracted. Conceivably Congress might have passed a marriage law or a law admitting only those spouses whose marital status accorded with what Congress thought the law should be. But it did not do so, and the plain language of the section, in using the term "spouse", requires that the law applicable to any such marriage be consulted.

As a matter of fact, in passing this statute Congress must have realized that a substantial number of the marriages would take place in foreign lands. When the law was enacted in 1945, American soldiers were stationed in countries as diverse in their legal systems as Germany, Japan, New Zealand, India, Iran, Egypt, England, and Russia. Quite clearly, American soldiers marrying aliens in any one of those countries would have to comply with the marriage laws of that country. And petitioners' counsel are informed that early in the occupation of Germany the military authorities advised American personnel that the validity of any marriages entered into in Germany would have to be determined by the applicable German law.¹¹

11. In this connection, it is worth noting that under the law of Germany a sham or fictitious or simulated marriage is valid. This is true as the result of paragraphs 1323 and 1330, in connection with paragraph 117, of the *Bürgerliches Gesetzbuch*. A recognized German authority on family law, Kitt and Wolff, *Familienrecht*,

The position the government now takes in effect repudiates the indictment, the trial, and the Court of Appeals. The issue of the validity of the marriages was paramount at each of these stages in the case. Count One of the indictment charges that the parties entered into "ostensible" marriages solely for the purpose of representing them as marriages to the United States Immigration and Naturalization Service (R. 6) and that the defendants conspired to commit the offenses set forth in Counts Two to Six.

Counts Two and Three charged that Munio Knoll and Leopold Knoll aided and abetted by other defendants

did unlawfully and knowingly obtain entry into the United States * * * by falsely representing to the United States Immigration and Naturalization Service * * * that [he] was married to * * * a citizen of the United States and by concealing and omitting to state * * * that [he] had gone through a marriage ceremony * * * solely for the purpose of representing himself as her husband in the said application for admission into the United States (R. 9-11).

Counts Four, Five and Six charged defendants with causing

to be made a false statement under oath in an application required by the Immigration laws * * * that is to say * * * the statement that the defendant * * * was then married * * * whereas the defendants then and there well knew, the defendant * * * was not in fact then married (R. 12-14).

(7th Ed. 1931), at page 75, states that a marriage entered into for the purpose of putting up an appearance or a simulated marriage is valid, and that this is so even though the officer of civil status (Standesbeamte) knows that that is the situation. This German rule does not appear to have been materially affected by Paragraph 19 of the Ehegesetz of 1938, as re-enacted as Control Council Law No. 16 of February 20, 1946, which has to do with marriages entered into by a woman solely for the purpose of acquiring the man's name. Incidentally, although this law was apparently intended to prevent Jewish women from acquiring Aryan names, the German courts during the Nazi regime stated that it was to be strictly construed. See *Entscheidungen, Reichsgericht in Zivilsachen*, Vol. 171, p. 79.

As is apparent from the indictment, an essential element of the crime for which the defendants were indicted and tried is guilty knowledge or intent. Since they were charged with conspiring to misrepresent marital status, the question of whether the representations were true or false depends upon whether the marriages were in fact valid or not valid. In order for there to be an intentional misrepresentation of marital status, the alien spouse had to believe that they were in fact not validly married when they represented to the immigration authorities that they were married. To argue now that whether the marriages were valid or not is immaterial, as the government does, is to concede that an essential element of the proof is lacking.

The trial court, recognizing that the essential issue created by the indictment and the evidence was the validity or invalidity of the marriages the defendants⁹ were charged with conspiring to misrepresent, charged the jury at great length with respect to the validity or invalidity of a marriage. He instructed at the government's request, and over defendants' objections (R. 298, 299, 304, 306, 307):

The Statute under which the aliens entered into the United States as non-quota immigrants did not vest in the immigrants an absolute right to enter into the United States. The entry of each of the aliens in the instant case into the United States was expressly on the condition that they were married to citizens of the United States who had been honorably discharged from the Armed Forces of the United States. It is a question of fact based upon the evidence in this case for the jury to determine whether or not at the time the aliens entered into the United States under the provisions of the United States Code they were in fact entering *as man and wife* and to thereafter reside in the United States *as man and wife*. * * *

Mutual consent is necessary to every contract and no matter what forms of ceremonies the parties may go through indicating the contrary, they do not contract

if they do not in fact assent, which may always be proved. *Marriage is no exception to this rule: a marriage in jest is not a marriage at all. It is quite true that a marriage without a subsequent consummation will be valid; but if the subjects agree to a marriage only for the sake of representing it as such to the outside world and with the understanding that they will put an end to it as soon as it has served its purpose to deceive, they have never really agreed to be married at all.* They must assent to enter into the relation as it is ordinarily understood, and it is not ordinarily understood as merely a pretense or cover to deceive others.

You are hereby instructed that it is for you, the jury, to determine from all of the facts in evidence what the intentions of the parties were at the time the marriage ceremonies were performed (R. 338-39). (Emphasis added.)

And at defendants' request, the Court instructed (R. 340):

If the consent of the parties is plainly expressed, *a secret reservation of one of the parties will not invalidate the marriage*, nor will the fact that one of the parties gave his consent to the marriage because of some ulterior motive or motives invalidate it. *If the essentials of capacity and consent are present, the marriage is valid*, even though one of the parties consented because he expected some material advantage as the direct consequence of his entering into the marriage. *The mere fact that one of the parties to a marriage knew and expected that by reason of entering into the marriage, his coming to the United States would be facilitated does not in and of itself render the marriage invalid.* (Emphasis added.)

The trial court thus recognized that the validity of the marriages was a crucial issue in the case, but he refused to accept the view that the validity of the marriages must be determined under French law, stating

I would assume the law of Paris, France, is the same

as the law of Chicago, Illinois, with respect to people going through something that is mockery, which they did not intend to be a marriage (R. 189).

Presumably, the instructions as given were intended to reflect Illinois law as to the validity of the marriages. Thus if the instructions should have been given pursuant to the laws of France, reversible error was committed. Or if, as the government now contends, the validity of the marriages was immaterial, was not error committed in giving the government's instructions as to the validity of the marriages over defendants' objections?

The Court of Appeals also recognized that the validity of the marriages was the crucial issue in the case. The original opinion of the Court of Appeals stated that

The contest in the Trial Court centered largely about these two questions, viz. did the defendants conspire, and if so, did the Government prove by competent evidence *that the marriages were in fact invalid* (R. 392). (Emphasis added.)

The opinion also said that

Before the jury could properly conclude that the scheme became an illegal conspiracy, it was necessary that the evidence be sufficient to justify the question that the three marriages were void,—of no legal effect, and that they were so intended, *for if they were valid, the Government cannot complain* (R. 395). (Emphasis added.)

The government asserts in this Court that whether or not the marriages were invalid is beside the point, and consequently, it is unnecessary to decide which law should determine their validity or invalidity. In view of what transpired in the trial court and in the Court of Appeals, this assertion, if correct, means of necessity not only that the Court of Appeals and the trial court committed a serious error as to what the issues were, but also that the jury

was erroneously instructed, and that the defendants were convicted of a crime other than the one charged in the indictment. Cf. *Bates v. United States*, 323 U. S. 15 (1944); *Minnich v. Gardner*, 292 U. S. 48 (1934); *Cole v. Arkansas*, 333 U. S. 196 (1948); *United States v. La Franca*, 282 U. S. 568, 576-77 (1931); *Pearson v. United States*, 192 F. 2d 681, 694 (C. A. 6th, 1951).

The petitioners were apparently convicted of conspiring to commit an offense, which, chameleon-like, changes its complexion from government Brief to government Brief and from court to court. Thus, whether the government is correct in the position it now takes, or whether petitioners are correct in asserting that the government had the burden of proving the invalidity of the marriages under French law, error was committed, and this Court should reverse the convictions.

V.

ON THE FACTS OF THIS CASE THE BIGAMOUS MARRIAGE INSTRUCTION WAS NOT PROPER. THE EVIDENCE UPON WHICH THE JURY WAS ASKED TO DECIDE WHETHER THE RABBINICAL DIVORCE OF MARIA AND MUNIO WAS EFFECTIVE WAS WHOLLY INSUFFICIENT.

The government has somehow concluded that the evidence as to Maria and Munio "pointed * * * strongly to an undissolved first marriage * * *" (Resp. Bf., p. 76, fn. 42). The Court of Appeals, on the other hand, concluded that whether Maria and Munio had been legally divorced was "not determinable from the record" (R. 393, fn. 1).

As summarized by the government (Resp. Bf., p. 75), the evidence on this point is hardly overwhelming. Moreover, although the government emphasizes that Munio Knoll changed his story, asserting originally that the divorce was a civil divorce and then that it was rabbinical,

it fails to mention how the whole subject of the rabbinical divorce entered the case in the first place. The jury heard of it in the prosecutor's opening statement, in which he said that the government "expects to show and submits it will prove that * * * these two persons obtained, during the war, what is known as a rabbinical divorce in Budapest * * *" (R. 23). Thus the government said it would prove a rabbinical divorce, and since the only evidence on the subject was contained in the statements of Munio Knoll to the Immigration and Naturalization authorities, the government can hardly now say that it proved either the absence of a divorce or the likelihood that the divorce shown was of no effect. Having undertaken to place certain facts before the jury, the government had an obligation to give those facts to the jury. If further facts were needed to make the facts actually adduced meaningful, it was up to the government to provide those facts too.

Obviously, the jury could not be expected to know whether a rabbinical divorce in Hungary in 1942 between two refugee Polish Jews was effective or not, in the absence of evidence on the subject. Having put this rabbinical divorce into the record, therefore, the government could not leave the jury to sink or swim on the basis of an instruction advising them that "the marriage of a man and a woman where one of the parties thereto has a husband or wife by a prior marriage who is then living and undivorced, is void" (Instruction 22, R. 339, 354).

It is this circumstance, namely, the government's undertaking to prove a rabbinical divorce, which clearly distinguishes this case from the usual bigamy trial. There the prosecution introduces evidence of the first marriage and evidence of the second marriage, and then rests. If the defendant claims that the first marriage was invalid or that it was dissolved, it is up to him to come forward with

evidence to that effect, since the usual presumption in favor of the second marriage, applicable in civil cases, is inoperative.

Apparently here the government wanted the jury to think that the rabbinical divorce was not effective to dissolve the marriage of Munio and Maria. Otherwise, why should it go out of its way to advise the jury that it would prove that such a rabbinical divorce took place, and then offer Instruction No. 22 (R. 329)? But asking the jury to reach that conclusion is quite a different thing from asking the jury to decide, on a showing of two successive marriages, that *no divorce* had taken place. Since it was the former conclusion the jury was asked to draw, and not the latter, the government was obliged to give the jury sufficient evidence from which to reach the desired conclusion. Thus the rule which prevails in bigamy cases, and upon which the government relies in justification of the bigamous marriage instruction (Resp. Bf., pp. 76-78), does not save the government from the consequences of a record from which the effectiveness of the Maria-Munio rabbinical divorce is "not determinable."

There is one further point. The majority rule appears to be that in a bigamy case the defendant's belief that he had been divorced from his first wife is no defense. There is a contrary view, however, to the effect that such a belief is a defense. Thus evidence as to the defendant's belief or good faith is, in jurisdictions adopting the latter position, admissible. 7 Am. Jur., Bigamy, § 51. Quite clearly, in the nature of the offense charged here, knowledge on the part of the alleged conspirators that the "ostensible" marriages were not real marriages was an essential element to be proved as part of the government's case. In the case of Munio, therefore, his awareness that he had not been validly divorced would have to be shown, thus making

it all the more essential that the government give the jury some evidence upon which to base a finding that the rabbinical divorce did not dissolve Munio's marriage to Maria.

CONCLUSION.

We believe that we have shown that the arguments of the government are unsound and fail to support the positions for which the government contends. We point out that the assertion by the government of its new theories and grounds for the admission of evidence would serve, if approved by this Court, to place defendants in future criminal cases at great disadvantage and make their defense, at best, guesswork. Justice requires a rejection both of the government's arguments and tactics and of the opinions expressed by the court below.

For the reasons advanced here and in petitioners' original Brief, the judgments should be reversed.

Respectfully submitted,

ANTHONY BRADLEY EBEN,

RICHARD F. WATT,

BERNARD WEISSBOURD,

Counsel for Petitioners.

JOSEPH L. NELLIS,

DUNNING, NELLIS & LUNDIN,

Of Counsel.

December 5, 1952.

APPENDIX A.

The Laws of Foreign Countries Dealing With Testimony by One Spouse Against the Other in Criminal Cases.

An examination of the statutory and case law of England, members of the British Commonwealth of Nations, the Australian states, and certain European countries reveals that restrictions upon adverse testimony by spouses are widespread. In some instances, as the summaries below indicate, similar restrictions apply to the testimony of persons other than the spouse, such as a fiancé, a former spouse, and close relatives.

Although counsel do not wish to represent to the Court that this material has been exhaustively studied or that all the relevant statutes and decisions have been found, they do believe that in view of the sweeping character of the Court of Appeals decision, the experience of other countries, some of which experience counsel have been able to locate and summarize, is pertinent and significant.

Although classifying these various foreign statutes is difficult, it is believed that the following presentation is reasonably accurate:

One spouse is not competent to testify against the other in a criminal case, except in certain specified instances:

Great Britain. Section 1 (c) of the Criminal Evidence Act of 1898 provides that "The wife or husband of the person charged shall not, save as in this Act mentioned, be called as a witness in pursuance of this Act except upon the application of the person so charged." Section 4 (1) enumerates the instances in which the husband or wife may be called as a witness without the consent of the accused. Most of these

exceptions involve sexual offenses, crimes against the person or property of the spouse, non-support, and the like. Section 4 (2) provides that the Act shall not affect any case where at common law the husband or wife of the person charged could be called as a witness without his consent. See *Rex v. Lapworth* [1931], 1 K. B. 117; *Rex v. Yeo* [1951], 1 All Eng. Rep. 864. The principal common law exception to the general rule, of course, has to do with crimes against the person of the wife. In such instances the wife is not only a competent witness, she is compellable, that is, she can be made to testify even though she is unwilling. The statutory exceptions enumerated in Section 4 (1), however, only make the spouse a competent witness; they do not make the spouse a compellable witness. See *Rex v. Leach* [1912], A. C. 305. That the general rule is based upon ideas of incompetency and not simply of privilege is shown by the recent decision of the Court of Criminal Appeal, *Regina v. Boucher*, The Law Times, Vol. 214, November 7, 1952, at page 235. There the defendant was tried on a charge of larceny. After the prosecution had introduced substantial evidence against him, the wife of the defendant was called as a witness by the prosecution and asked if she was willing to testify. She thereupon testified, and *no objection was raised by the defense*. It appeared, nonetheless, that her testimony was quite damaging to the defendant. On appeal the conviction was quashed on the ground that the wife's testimony was improper. The court indicated that there was no doubt of the defendant's guilt. See, generally, Roscoe, *Criminal Evidence* (1952), pp. 132-33. It also appears that the husband or wife of a defendant is regarded as a competent witness against co-defendants only to the same extent as he or she would be against his or her spouse. See *Rex v. Mount and Metcalfe*, 24 Crim. App. Rep. 135 (1934).

Canada. The rule in Canada, under Sections 4 (1) and 4 (2) of the Evidence Act of 1927, appears to be substantially the same as in England. See *Rex v. Allen*, 22 Can. Crim. Cases 124 (1913).

South Africa. Under Sections 263 and 264 of Act 31, Criminal Procedure and Evidence, 1917, the rule appears to differ from that of England in that the spouse is competent and compellable in these instances only: offenses against the person of the spouse or of any of the children, bigamy, and incest.

South Australia. Section 18 of the Evidence Act, 1929-1933, is similar to the English statutory provisions. The instances in which the spouse is competent involve primarily sexual offenses.

The spouse of a defendant cannot testify against him without his consent. Thus the privilege to prevent the testimony is with the defendant spouse.

France. Under Section 156 and 322 of the Code d'instruction criminelle, November 27, 1808 (published by Dalloz in 1950 in Bulletin Legislatif), a defendant may prevent the testimony of his spouse. He may also exclude the testimony of his parents, grandparents, children, grandchildren, other direct descendants, brothers and sisters, and brothers-in-law and sisters-in-law. The witness, however, cannot refuse to testify.

Belgium. Sections 156 and 322 of the comparable Belgian code are the same as the French provisions. Code d'instruction criminelle, April 17, 1878 (published by Larquier in 1935 in the collection known as Les XV Codes).

Victoria. Section 34 (2) of the Crimes Act of 1891 seems to give the defendant the privilege; the exceptions are similar to those in England.

The spouse of a defendant cannot be compelled to testify. Thus the privilege to prevent the testimony is with the witness spouse.

Germany. Under Section 52 of the code of criminal procedure, Strafprozessordnung, 1/2/1877, in der Fassung vom 12 Sept. 1950 (BGBl. 629), the spouse of the accused has the right to refuse to testify. Under

Section 63, the court must advise the witness of this right to refuse to testify. The privilege also extends to the fiancé of the accused, his former spouse, and to certain relatives. Even where a marriage has been annulled, as for fraud or for bigamy, a spouse of such a marriage need not testify against the other. *Entscheidungen, Reichsgericht in Strafsachen*, Vol. 47, p. 286 (8 July 1913, g. I. IV 524/13).

Austria. Sections 152 and 258 of the Strafprozessordnung, 23 May 1873, contain the same provisions as the German code. The Austrian code was re-enacted after the war (Gesetz vom 12/6/1945, StGBL, Nr. 26).

Switzerland. Articles 75 and 76 of the Bundesgesetz über die Bundesstrafrechtspflege, 15 June 1934, are very similar to the German and Austrian provisions.

Norway. The Norwegian criminal procedure act, Lov om rettergangsmåten i straffesaker (Strpl.), July 1, 1887, Chap. XV, Section 176, contains provisions much like those of Germany, Austria, and Switzerland. Under this act, even the spouse of a brother-in-law or sister-in-law of the accused is accorded the privilege.

The Netherlands. Article 217 of the Wetboek van strafvordringen (published in *Nederlandsche Wetboeken*, Martinus Nijhoff, the Hague, 1936) is similar to the German, Austrian and Swiss provisions. Although Article 284 requires the court to question the witness about his relationship to the accused, there does not appear to be any requirement that the witness be advised of his privilege.

New South Wales. Section 407 of the Crimes Act of 1900 provides that the husband or wife of the accused shall be competent to give evidence, but not compellable.

Queensland. Section 3 of the Criminal Law Amendment Act of 1892, as amended by the Criminal Code of 1899, the Statute Law Revision Act of 1908, and the Justices Acts Amendment Act of 1929, provides that

"Every person accused of an indictable offence and the wife or husband, as the case may be, of every such accused person, shall be a competent witness on his or her behalf, but shall not be compellable to be a witness without his or her consent." Although this language is not free from ambiguity, it appears to give the privilege to the witness.

Western Australia. Section 8 of the Evidence Act of 1906, as interpreted by *Rex v. Bishop* [1913], 15 W. A. Law Rep. 70, makes the spouse a competent but not a compellable witness. Section 8 (1b) provides that the court must advise the witness of his privilege.

APPENDIX B.

Representative Modern Authorities Dealing With the Marriage Relationship.

Burgess and Locke, *The Family* (American Book Co., 1945), particularly Part III—Family Organization.

Sullivan, *Conceptions of Modern Psychiatry* (The William Alanson White Psychiatric Foundation, 1947).

Goodsell, *Problems of the Family* (Century Co., 1936).

Nimkoff, *Marriage and the Family* (Houghton Mifflin Co., 1947).

Redfield, *The American Family: Consensus and Freedom* (The American Journal of Sociology, November 1946, at 175).

Wrong, *The Breakup of the American Family—Not a Dying But an Evolving Institution* (Commentary, April 1950, at 374).

Office - Supreme Court, U. S.

FILED

JUN 23 1952

CHARLES LEONARD CROFT

CLERK

No. 66

LIBRARY
SUPREME COURT, U.S.

In the Supreme Court of the United States

OCTOBER TERM, 1952

MARCEL MAX LUTWAK, MUNIO KNOLL, AND
REGINA TREITLER, *Petitioners*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court
of Appeals for the Seventh Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

| | Page |
|---------------------------|------|
| Opinions below. | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Statement | 2 |
| Argument | 19 |
| Conclusion | 27 |

CITATIONS

CASES:

| | |
|---|--------|
| <i>Bassett v. United States</i> , 137 U.S. 496 | 25 |
| <i>Krulewitch v. United States</i> , 336 U.S. 440 | 19, 22 |
| <i>Miles v. United States</i> , 103 U.S. 304 | 25 |
| <i>United States v. Rubenstein</i> , 151 F. 2d 915, certiorari denied, 326 U.S. 766 | 25 |

In the Supreme Court of the United States

No. 66

MARCEL MAX LUTWAK, MUNIO KNOLL, AND
REGINA TREITLER, *Petitioners*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court
of Appeals for the Seventh Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The original opinion of the Court of Appeals (R. 391-400) and its supplemental opinion on rehearing (R. 404-414) are reported at 195 F.2d 748.

JURISDICTION

The judgments of the Court of Appeals were entered January 3, 1952 (R. 401-403). A petition for rehearing was denied on April 16, 1952 (R. 415). The petition for a writ of certiorari was filed May 16, 1952. The jurisdiction of this Court

is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether, in a trial for conspiracy to bring aliens into the United States as spouses of United States veterans upon the basis of ostensible marriages and to continue to conceal the true nature of the relationships from the Immigration and Naturalization Service, evidence relating to certain acts after the entries into the United States was improperly admitted as relating to matters subsequent to the termination of the conspiracy or not in furtherance thereof.

2. Whether after considerable testimony had been introduced as to the sham character of the marriage the testimony of the ostensible wife was properly admitted over objection of the ostensible husband.

3. Whether ostensible marriages in France were to be presumed valid under the law of France in the absence of a showing by defendants to that effect.

STATEMENT

The petition for a writ of certiorari seeks review of judgments of the Court of Appeals for the Seventh Circuit (R. 401-403) unanimously affirming the judgment of the District Court for the Northern District of Illinois imposing sentences of two years imprisonment and fines of \$10,000 on each of petitioners (R. 366-367) upon the verdicts of the jury (R. 358-360) finding petitioners guilty

as charged in the first count of a six-count indictment.¹ That count charged petitioners and two others, Leopold Knoll and Grace Klemtnner,² with conspiracy to commit substantive offenses set forth in the remaining counts, and conspiracy to defraud the United States of and concerning its governmental functions and rights with respect to the immigration laws and the Immigration and Naturalization Service (R. 4-9).

It was alleged that a conspiracy was begun on or about July 1, 1947, under which Marcel Lutwak, Bess Osborne, and Grace Klemtnner, all unmarried citizens of the United States and honorably discharged veterans of the second world war, would journey to Paris and go through the form of a marriage ceremony with three aliens residing in Paris, Maria, Munio and Leopold Knoll, respectively; that the three aliens would then enter the United States as non-quota immigrants and would not live with their ostensible spouses as man and wife but would sever the ostensible ties as they saw fit. It was further charged that, as a part of the conspiracy, petitioners and Leopold Knoll and Grace Klemtnner "would at all times subsequent to the formation of the said conspiracy conceal such transactions and acts aforesaid and would do such other, further and different acts as they might deem necessary and expedient to prevent the disclosure to the United States Immigration and Naturalization Service of the existence of said con-

¹ The remaining counts were dismissed for want of venue (R. 291, 302, 333).

² Leopold Knoll was acquitted (R. 361) and the indictment was dismissed as to Grace Klemtnner (R. 224-225, 333).

spiracy" (R. 5-7). The specified 21 overt acts included, *inter alia*: conversations of Treitler in the late summer of 1947 with respect to obtaining spouses for the Knolls; trips to Paris and going through the form of marriage ceremonies there by Marcel Lutwak on August 21, 1947, by Bess Osborne (accompanied by Treitler) on November 4 [sic], 1947, and by Grace Klemtner on November 6, 1947; entry of the three ostensible spouses into the United States on September 9, November 13, and December 5, 1947; the residing together, commencing in November 1947, of Munio Knoll and Maria, the ostensible wife of Marcel Lutwak; the residing apart, commencing December 1947, of Leopold Knoll and his ostensible spouse; the conversation of Marcel Lutwak, Munio Knoll, and Bess in November 1947, in which the latter was paid \$1,000 for her participation in the ceremony; and the divorce, on March 31, 1950, of Marcel Lutwak and his ostensible spouse (R. 7-9, 30-32, 206).

At the trial, the Government's first witness, Anne Zapler, testified that in the late summer of 1947 petitioner Regina Treitler twice asked her whether she "knew of any girls who could go to Europe and marry her brother and bring him here to the States," the girl to have her way paid and to receive a fee and "at the end of the period of six months, they could be divorced and they would not have to consummate the marriage" (R. 29-31, 37-38). Later, Zapler had a conversation with petitioner Lutwak, a nephew of Treitler, regarding the same matter but she did not recall what it might have been (R. 31). In September 1947, Zapler introduced Bess Osborne to Lutwak,

mentioning that Osborne was an ex-Wave (R. 31-33). Later in September, Treitler expressed her happiness over the fact that Bess "had consented to go," upon the apparent assumption that the ex-Wave was to marry Leopold Knoll (R. 35).³

The Government's second witness, Maria Knoll, who had entered the United States as Lutwak's ostensible wife, had obtained a divorce from Lutwak before trial (R. 69-70, 91-92). She had been married in 1932 to petitioner Munio Knoll, Lutwak's uncle (R. 60, 71-72), but Knoll's counsel interposed no objection to her testimony, contending that Maria had been validly divorced from Knoll in 1942 (R. 52). She testified on direct examination as follows:⁴

She first met Lutwak in Paris at the end of July or beginning of August 1947, being introduced to him by an uncle, as well as by Munio and Leopold Knoll, and by a cousin Charlotte (R. 60-61). She was married to Lutwak in Paris on August 31, 1947, in a civil ceremony, in the presence of Munio Knoll and the cousin Charlotte (R. 60). No wedding ring was ever received from Lutwak (R. 62). On September 9, 1947, the witness entered the port of New York as a bride of a United States serviceman; she signed the application for admission (Govt. Ex. 1), but the data therein were written out by Lutwak, including the representation that her destination was Lutwak's home on Madison Street, Chicago (R. 62-63).

³ The Zapler testimony was at first admitted only against Treitler and Lutwak, respectively (R. 30, 32, 35), but, upon the further testimony indicative of a conspiracy by three more witnesses, was admitted against all the defendants (R. 141).

⁴ Her testimony was admitted as against all the defendants (R. 287).

On September 10, she arrived in Chicago and resided with either Regina Treitler or a relative for about three months. Thereafter, she resided in Munio Knoll's apartment on Maypole Street until November 1948, except for a few months spent in New York, and thereafter in New York until the date of the trial. At no time during this period did Lutwak live in the same house or apartment with Maria. Munio Knoll lived at the Treitler home commencing with the middle of November 1947, during Maria's stay there. (R. 65-69.)⁵

Ludmer and Haberman, two business associates of Munio Knoll subsequent to his entry into the United States, each testified that Treitler told them that she had "helped [Munio and Leopold Knoll] come to this country by getting girls and paying them off" and that she "paid off a thousand dollars each" (R. 93, 96-97, 180).⁶

* On cross-examination, Maria stated that she was acquainted with Lutwak for about four weeks before the marriage ceremony, that there had been a courtship, that she fell in love, that there was no talk in Paris of getting a divorce, that she lived with Lutwak as husband and wife at all of the Chicago addresses, that the marriage was "consummated," and that she had never lived with Munio Knoll as husband and wife after her marriage to Lutwak (R. 76-78, 82, 84-85, 90).

* Petitioners sought to show bias on the part of Ludmer and Haberman on the basis of their business disagreements with Munio Knoll (R. 108-109, 112, 120-123, 128). The Treitler statements in the presence of Ludmer were made in a conversation which included Lutwak and Munio Knoll, and were admitted only against Treitler, Lutwak, and Munio Knoll

In conversations with Haberman in New York in late November and early December 1947, Munio Knoll stated, in the presence of Lutwak, that he and Lutwak were awaiting the arrival of Leopold Knoll. He explained the speed of his own entry into the United States and that of Leopold as follows, "when you have the right connections and are willing to spend money you can pave your way very quickly." "You see how easy it is to come to the United States if you know how." (R. 151, 153, 155). Knoll also referred to Maria as his wife, and Lutwak stated himself to be unmarried (R. 153).⁷

During January 1948 and the early part of February, Ludmer considered the Maypole Street apartment as the residence of Maria and Munio Knoll (R. 94-95) and knew Maria's last name as "Mrs. Knoll" (R. 103, 118). He picked up Knoll on the way to business almost daily and saw only Maria and Knoll at the apartment in the mornings (R. 104-105). On one Sunday in early February 1948, after an evening at the Treitlers', he took Maria to the Maypole Street address and Lutwak to "his home" at another address (R. 104).⁸

(R. 94, 129); the Treitler statement made to Haberman was admitted only against her (R. 180).

⁷ These conversations were admitted only as against Munio Knoll and Lutwak (R. 152).

⁸ There was testimony, admitted only against Munio Knoll, that in February 1948 Knoll rushed to Chicago after receiving a telephone call in New York (R. 162-165), that he subsequently reported that he had difficulty in getting into his Chicago apartment and that, when he got in, Lutwak jumped through the window (R. 98-99, 101-103). Thereafter, Maria

In June 1948, Haberman saw Maria with Knoll at the Maypole Street apartment, including an early morning sight of them in bed together (R. 176-179). Maria was always known as Munio Knoll's wife to Haberman, and never as Mrs. Lutwak (R. 181).

Jane Turner testified that she saw Grace Klemtner off to Europe at the Chicago airport in December 1947 and met her upon her return at the New York airport as the ostensible Mrs. Leopold Knoll (R. 132-134). Present upon Klemtner's return were Leopold and Munio Knoll, and Marcel Lutwak (R. 134). Klemtner told Turner that Leopold was ill (R. 137). The two women went from the airport to a New York hotel, where they stayed for three days. Thereafter, they went to Los Angeles, where they resided together in various apartments until the time of the trial. At no time did Leopold Knoll reside with Klemtner and Turner. In Los Angeles, Grace used the last name "Klemtner," but received mail under the name "Knoll" as well as "Klemtner." She received letters and money from Leopold Knoll from time to time (R. 134-138).

Subsequent to the foregoing testimony, the United States Attorney read into the record the sworn testimony of Munio Knoll before immigration officers given on November 24, 1948, and Janu-

went to New York (R. 102). In April and again in May 1948, Haberman saw Maria and Munio Knoll at a New York hotel and when he urged Knoll to become reconciled with Maria, Knoll replied that it was not simple after having come back suddenly from New York and "found her with another man" (R. 165, 169). In the second conversation Knoll thought he might get together again with Maria (R. 169).

ary 4, 1949. The statements were received in evidence only against Munio Knoll (R. 185, 282; Gov. Exs. 13 and 14), and disclosed the following:

Knoll had first testified in the immigration service investigation to the effect that he had obtained a court divorce from Maria in Budapest in 1942 on the ground that he and Maria were second cousins (Gov. Ex. 13, p. 5). He later testified that the divorce was a "Jewish divorce," not a court divorce (p. 11), although he was a professing Catholic at the time (Gov. Ex. 14, p. 4). Still later, he testified that the reasons given had been sexual incompatibility, the separation of Maria from him, the absence of any children, and the concealment of identity from the Nazis (Gov. Ex. 14, p. 3). He could not produce the divorce decree (Gov. Ex. 13, p. 11) but testified that he had exhibited it to the Paris officials at the time of his ostensible marriage to Besse Osborne in 1947 (p. 7).⁹ After the rabbinical divorce he and Maria went to different towns in Hungary (Gov. Ex. 13, p. 13). They were apparently together in Roumania, Maria allegedly being employed by him there (Gov. Ex. 14, p. 6). She preceded him to Paris in 1947 by three months and lived "on her own money" there, including money which Knoll paid her by reason of his employment of her in Roumania (pp. 5, 6). Knoll reached Paris in June 1947. He denied that he

⁹ He explained the fact that his prior divorce did not appear in the 1947 marriage certificate although that of Osborne was stated (see Dfts. Ex. A), because he had not felt it necessary to direct attention of the Paris authorities to the divorce, since he assumed they would note it from the decree he had left in the papers deposited by him (Gov. Ex. 13, p. 13).

held out Maria as his wife or lived with her. He denied that he knew of any ulterior purpose in her marriage to Lutwak, although he had stated to her "that she should marry [Lutwak] as it was the only way she could gain entry into the United States" (pp. 5-6). He denied any payments or promises to Lutwak (pp. 7, 25-26). He further denied that there was any discussion looking toward his following Maria to the United States. He testified that although the United States relatives wanted him to "reunite" with Maria, he wrote to them that he neither wanted to go to the United States nor rejoin Maria (p. 6).

With respect to the period of approximately a week from the time of Bess Osborne's arrival in Paris to the date of the ostensible marriage with her,¹⁰ Knoll testified, "I was living in a hotel where all the Americans congregated and she was living in that hotel and I got to know her. I showed her Paris. * * * [N]obody introduced me" (Gov. Ex. 13, p. 7). He testified, "On my part the marriage was bona fide because one takes every step possible to come to America and whether it was bona fide on her part, I can't answer that directly" (Gov. Ex. 14, pp. 11-12). He asserted that the marriage was "consummated" in Paris but that he had never had sexual intercourse with Osborne, and had spent only part of one night in Paris with her (p. 13). The two separated upon arrival in the United States (p. 24).

¹⁰ Osborne left Chicago for Paris by plane on October 25, 1947 (Gov. Ex. 8). The ostensible marriage ceremony took place on November 3, 1947 (Dft. Ex. A).

Knoll further testified that about three days after his arrival in Chicago, Lutwak asked Knoll to meet him and Osborne at the Admiral restaurant, since Osborne needed money. Knoll went to the restaurant, desiring to be present at any payment of money, because he had heard that a portion of an aggregate sum of \$10,000 Knoll had sent to a sister in New York, had been diverted to Lutwak. He saw Lutwak deliver a check to Osborne but knew nothing of its amount or the source of the money (Gov. Ex. 14, pp. 7-8, 10, 14-15).

He testified that he had moved to the Maypole Street apartment in Chicago on December 24, 1947, and that Maria left when he moved in, but returned for a few days and did not live there "the whole time." He asserted that the living together with Maria was never as man and wife. (Gov. Ex. 13, pp. 11-12, Gov. Ex. 14, pp. 25-26.)

After the reading into evidence of Munio Knoll's statements, Bess Osborne, over objection of defense attorneys, was permitted to testify, the trial judge ruling that in the case of "people going through something that is a mockery, which they did not intend to be a marriage" preliminary *voir dire* examination of the ostensible wife would be unnecessary and that no foreign law would be presumed to grant the status of spouse upon the basis of the facts in evidence (R. 187, 189). Osborne testified, *inter alia*, as follows:

She was introduced to Lutwak early in September 1947 by Zapler. Lutwak told her he had an uncle Leopold Knoll in Europe whom he wanted to bring to the United States, that he wanted a woman who had been in the service to marry the uncle for the purpose and would pay \$1,000, and that after

six months the ostensible spouse could have a divorce. About a week later, Osborne met Treitler at her home with Lutwak and Maria present. Treitler urged the sympathetic aspects of the project upon Osborne (R. 192-195, 202).

About the end of September, Lutwak and Osborne had further talks arranging the details of her trip, and the payment of \$500 for expenses and \$100 for clothes. Lutwak asked Osborne to marry Munio instead of Leopold Knoll, so that Munio could be reunited with his former wife. Lutwak accompanied Osborne when she applied for her passport (R. 195-198, 219-220). Osborne met Treitler again at the Chicago airport on October 25, 1947, when the two left for Paris. Osborne did not pay for her own ticket. Lutwak and Maria were also present. At Paris, the next day, Osborne and Treitler were met by Munio Knoll and a relative of the Knoll's, Wireberg. Treitler introduced Osborne to Knoll. They stayed at le Khedive hotel, where Knoll also stayed. During the week following their introduction, Osborne and Knoll went to a lawyer's office where all arrangements for the ostensible marriage were made. The marriage ceremony occurred on November 3, 1947, at the Paris City Hall, in the presence of Leopold Knoll and Wireberg. No wedding ring was given Osborne either then or thereafter (R. 191-192, 197-199).

After the ceremony, Osborne lived by herself at le Khedive and later at another hotel. During this time Treitler told her, several times, that she would receive \$1,000 (R. 200-201). On November 12, 1947, Munio Knoll and Osborne left Paris, arriving in New York on November 13, where Knoll applied for admission as a nonquota immigrant

(R. 202-204). They arrived in Chicago that night. Lutwak and Maria were among the group at the airport. Lutwak and Osborne went by cab to a hotel, Lutwak again informing Osborne that she would get \$1,000. Knoll went elsewhere with the others. About three days later, Osborne, Lutwak, and Munio Knoll met at the Admiral restaurant, where Lutwak gave Osborne a \$1,000 check signed by Lutwak (R. 204-207).

About six months later, Osborne discussed a divorce with Knoll, and Knoll asked her to wait two years "because he wanted to become an American citizen." On May 3, 1950, Osborne filed her petition for divorce.¹¹ In November 1950, Knoll asked her to wait until after the conspiracy trial¹² (R. 208-209).

At no time did Munio Knoll ask that the ostensible marriage be "meant" or be followed by living together (R. 215). At no time subsequent to the ceremony did Osborne use the ostensible married name and, according to the understanding, she was not to use the name. The marriage was never "consummated." Munio Knoll never contributed to Osborne's support and Osborne never lived with him (R. 209-210, 213, 220).

Grace Klemtner was then called as a witness of the court, upon the Government's expression of unwillingness to vouch for her, and over objection

¹¹ The petition included an allegation that Osborne had "lived and cohabited" with Knoll until his desertion of her on November 15, 1947; Osborne testified that she had not read the text of her petition and would not have signed had she noted the statement (R. 214, 221-222).

¹² This conversation was admitted only against Munio Knoll (R. 209).

that she was the wife of Leopold Knoll (R. 224-226). She testified to substantially the same chronology of events already in evidence, i.e., her departure for Paris on November 1, 1947 (R. 228); the marriage ceremony on November 6 (R. 245), Knoll's entry into the United States with her on December 5 (R. 251), the residing with Turner at all times thereafter in New York, Chicago, and Los Angeles up to the time of the trial (R. 254-256). Klemptner further testified that she had known Treitler for many years and saw her three or four times a year at meetings of a women's organization to which both belonged. She had seen Treitler a few weeks before November 1, 1947, and Treitler arranged a hotel reservation in Paris for her, but made no suggestions concerning Klemptner and the brothers in Paris and never paid her any money (R. 228-230, 232). Klemptner first met Lutwak in 1946.¹³ She testified that he had nothing to do with her trip, never paid her any money, never informed her of his own trip and marriage. He was present when Klemptner applied for a passport, and he took her and Turner to the airport (R. 232-234, 237-238, 247). In a later portion of her testimony, she refused to answer the question whether she had talked to Treitler or Lutwak about Leopold Knoll before leaving Chicago, asserting the privilege against self-incrimination (R. 247). She also refused to testify on the grounds of self-incrimination as to the source of the money for her round-trip plane fare (R. 242).

¹³ Klemptner offered no explanation of the statement in Lutwak's affidavit on Klemptner's passport application that he knew her for four years (R. 238-239).

In conclusion, sworn statements to the immigration authorities by petitioners Treitler and Lutwak and by Leopold Knoll were read into evidence and admitted, in each case, only against the defendant who made them (R. 273-275, 282, Gov. Exs. 15-18).

Lutwak refused to testify before the immigration authorities concerning Maria (Gov. Ex. 15, p. 4). He did testify that he met Osborne at Treitler's home, that the whole family asked him to speak to Osborne about marrying his uncle and that there was a general "understanding" that Osborne would marry Munio "if they liked each other" (pp. 5-6, 10-13).

With respect to the payment to Osborne of \$1,000 in November 1947 at the Admiral restaurant, Lutwak "vaguely" recalled that Munio Knoll had called for the meeting and directed this application of money held for him by Lutwak. He did not recall whether the money was payment for the ostensible marriage. Lutwak stated that he himself had never paid or been paid or promised anything in connection with the ostensible marriages (pp. 15-17).

Treitler testified before the immigration authorities that she knew Munio was unhappy because of his divorced status and she spoke with Osborne about him in the hope of making him happy (Gov. Ex. 16, p. 4; Gov. Ex. 17, p. 3). She stated that she could not recall whether Osborne was her invitee or guest on the Paris trip, and did not remember an agreement to pay \$1,000 to Osborne (Gov. Ex. 16, p. 4; see also Gov. Ex. 17, pp. 3-4). Asked whether she knew, before going to Paris, whether "such marriages would facilitate

the entries," she testified that she "thought perhaps when they're married that will help them out to come later on to the United States" (Gov. Ex. 16, p. 6). In reply to questions whether there had been an earlier suggestion that Osborne would marry Leopold rather than Munio Knoll, whether other sisters assisted financially in bringing the relatives to the United States, and whether she ever talked with Grace Klemtner about a trip to Paris to meet the brothers, her response was that she could not remember (pp. 4-6).

The judge's instructions to the jury included the following language:

During the trial, evidence has been admitted only as to certain defendants. You may consider that evidence, so limited, only as to those defendants, and not as to other defendants.

* * * The declarations, statements and conversations of one or more defendants, made out of the presence of the other defendants, is not binding upon any other defendant, unless the evidence—not including any of such declarations, statements or conversations other than his own—shows, beyond a reasonable doubt, that such other defendant was a participant in the conspiracy charged in the First Count of the indictment at the time of such declarations, statements or conversations, and unless, further, the declarations, statements and conversations were in furtherance of the conspiracy and made during its continuance.

* * * [R. 337-338].

* * * In considering whether or not a particular defendant was a member of the conspiracy, you must do so without regard to and independently of the statements and declarations of others. In other words, you must determine the membership of the particular defendant from the evidence concerning his own actions, his own conduct, his own declarations, or his own statements, and his own connection with the actions and conduct of others. [R. 341].

* * *

The mere knowledge, acquiescence, or approval of an act, without cooperation or agreement to cooperate, is not enough to constitute one a party to a conspiracy. * * * [R. 342].

* * *

* * * It is a question of fact based upon the evidence in this case for the jury to determine whether or not at the time the aliens entered into the United States under the provisions of the United States Code they were in fact entering as man and wife and to thereafter reside in the United States as man and wife. [R. 338].

* * *

Mutual consent is necessary to every contract and no matter what forms of ceremonies the parties may go through indicating the contrary, they do not contract if they do not in fact assent, which may always be proved. Marriage is no exception to this rule: a marriage in jest is not a marriage at all. It is quite true that a marriage without a subse-

quent consummation will be valid; but if the subjects agree to a marriage only for the sake of representing it as such to the outside world and with the understanding that they will put an end to it as soon as it has served its purpose to deceive, they have never really agreed to be married at all. They must assent to enter into the relation as it is ordinarily understood, and it is not ordinarily understood as merely a pretense or cover to deceive others.

You are hereby instructed that it is for you, the jury, to determine from all of the facts in evidence what the intentions of the parties were at the time the marriage ceremonies were performed. [R. 339.]

* * *

* * * It is sufficient if the parties intend immediately to be bound permanently, even though they do not intend forthwith to assume all the duties and responsibilities of marriage. Moreover, once there is this meeting of the minds and the marriage ceremony required by law is performed, the marriage is complete and the status of the parties as married becomes fixed by law, even though they immediately repudiate the agreement and thereafter act in total disregard of their marital rights and duties.

Although the cohabitation of the parties, subsequent to the marriage, is evidence of the existence and reality of their consent, cohabitation is not necessary to the validity of the marriage. Nor is a marriage invalid merely because it has not been consummated.

If the consent of the parties is plainly expressed, a secret reservation of one of the parties will not invalidate the marriage, nor will the fact that one of the parties gave his consent to the marriage because of some ulterior motive or motives invalidate it. If the essentials of capacity and consent are present, the marriage is valid, even though one of the parties consented because he expected some material advantage as the direct consequence of his entering into the marriage. The mere fact that one of the parties to a marriage knew and expected that by reason of entering into the marriage his coming to the United States would be facilitated does not in and of itself render the marriage invalid. [R. 340.]

ARGUMENT

I. Petitioners contend that there is a conflict between rulings on admission of evidence herein and the decision in *Krulewitch v. United States*, 336 U. S. 440. They base the contention on a broad assertion that "[t]he alleged objective of the conspiracy charged was to secure the illegal entry" and that "[u]pon the attainment of that objective the conspiracy terminated" (Pet. 9). The assertion both misstates what was "charged" and ignores what was proved in direct evidence as to the scope of the conspiracy.

The indictment charged not only conspiracy to obtain the fraudulent entry of the aliens into the United States but also conspiracy to live apart in the United States and sever the ostensible marital ties as they saw fit, and, further, to "conceal" the various acts and to do any further acts that the con-

spirators might deem "necessary and expedient" to prevent disclosure to the Immigration and Naturalization Service (*supra*, pp. 3-4). The indictment charged numerous acts after the entries as being overt acts under the conspiracy, including the residing apart of the ostensible spouses, the residing together of Maria and Munio Knoll, each of whom was the ostensible spouse of someone else, the payment of \$1,000 to one of the ostensible spouses, and the divorce proceedings to terminate the ostensible ties of one of the "marriages" (*supra*, p. 4). These steps of the conspiracy, to be performed after the entries into the United States, were obviously necessary parts of the whole scheme.

Moreover, these later steps were evidenced against each conspirator by ample direct testimony requiring no reliance on hearsay evidence of what some other participant in the conspiracy might have said. Thus, Treitler was shown by her own direct statements to Zapler to have contemplated various aspects of the conspiracy which would necessarily be subsequent to the entry of the ostensible spouses into the United States; at the time she was seeking girls to marry her brothers, Treitler said that the girls could be divorced after six months and that the marriage would not have to be consummated (*supra*, p. 4). Similarly, both Lutwak's own hand-written statement, prepared for Maria's signature on her application for admission, and Munio Knoll's own application for admission, falsified the destination of the ostensible alien spouses, thereby affording clear and direct evidence in public records that continuing concealment after entry into the United States was

a part of the conspiracy (Gov. Exs. 1 and 2; and see *supra*, p. 5). Furthermore, the subsequent conduct and admissions of Lutwak and Munio Knoll which were conclusively evidentiary of an earlier plan to live apart from the ostensible spouses in the United States; to make cash payment in the United States, to conceal, and in good time to be legally divorced from their ostensible spouses, were evidenced by testimony of witnesses who told of what they themselves heard and saw the two confess and do; these witnesses were not reciting hearsay of what someone else had told them that Lutwak and Knoll admitted or did. Lutwak and Knoll themselves testified to the payment to Knoll's ostensible spouse after arrival in Chicago, differing only in their story as to where the money came from. The \$1,000 payment was not first thought up within the few days after arrival in the United States.

Furthermore, the separation of both sets of spouses immediately after arrival in the United States, and the immediate living together of Munio Knoll and Maria were scarcely consistent with anything but a plan that had patently envisaged what was to take place beyond the moment of entry into the United States. Lastly, the divorce proceedings with respect to both the Lutwak and Munio Knoll marriages constituted evidence, in public records and not hearsay, of conduct consistent with a plan which from its inception, envisaged divorce after entry.

In light of the clear charge in the indictment that the conspiracy included steps subsequent to the entry of the aliens into the United States, and in light of clear, direct evidence substantiating that charge, together with the trial judge's explicit in-

structions to the jury (see *supra*, pp. 16-17), there is no occasion for application of the rule in *Krulwitch v. United States*, *supra*, which dealt with a case in which hearsay evidence of the statement of one conspirator was sought to be used against another from a period of time subsequent to anything charged or proved as the duration of the conspiracy. In *Krulwitch*, this Court merely refused to infer a continuing "implied but uncharged" conspiracy to conceal (p. 444), after the charged conspiracy, relating to a single trip to Florida for purposes of prostitution, had been consummated. Here the charge and evidence obviate any need for inference in order to establish the duration of the conspiracy. The conspiracy was still operative at the time of all acts or statements of conspirators admitted in evidence against other participants."

2. Although the court below entered into extensive consideration of whether a wife's testimony, in light of reason and experience, should still be inadmissible against her husband, and concluded that the husband's privilege in this respect should

¹⁴ It is to be noted that wherever there could be the slightest doubt whether a conversation was in furtherance of the conspiracy, the evidence of the conversation was carefully limited by the trial judge to the participants and was not admitted against others of the conspirators; e.g., the limitation of Munio Knoll's statements in the presence of Ludmer and Haberman (*supra*, pp. 7-8, fns. 7-8). Such limitation constituted a further elimination of any occasion for application of the *Krulwitch* rule. While petitioners contend in general terms that "[T]he decision below now extends [the hearsay] exception [to] admit into evidence statements and acts of a conspirator not in furtherance of the conspiracy and after it has terminated" (Pet. 11), they fail to specify a single instance in which conversations not in furtherance of the conspiracy were admitted against other conspirators.

no longer be recognized (R. 405-413), the question is not here posed for decision, since the trial judge, upon the state of the record, had no wife before him nor even prima facie evidence of a marriage.

The question is involved only with respect to the testimony of Bess Osborne. Maria, at the time of the trial, had been divorced by Lutwak. The United States Attorney asked her no question whatsoever involving confidential marital communications during the time between the ostensible ceremony with Lutwak in Paris and the divorce in the United States, or during the time of her admitted marriage, between 1932 and 1942, with Munio Knoll. (R. 40-41, 58-70, 90-91.) In the case of Grace Klemtner the privilege, if any, of objecting to her testimony would have been available only to Leopold Knoll, with whom she entered into an ostensible ceremony. In view of Leopold Knoll's acquittal the question with respect to her is moot.

Returning to Bess Osborne, it is to be noted that the court below stated, in the alternative, that if it was wrong in its general conclusion that the earlier common-law privilege of a husband no longer existed, the condition of the record was such that the trial judge was nevertheless justified in admitting the testimony (R. 413). We submit that the judgment below was correct upon this alternate basis and sustainable on the ordinary principles of evidence without need for considering any new or conflicting rulings of law. When Osborne was offered as witness, Zapler had already testified to successful efforts of Treitler and Lutwak to find a girl who would go to Paris, go through a ceremony with Munio Knoll without consummating the mar-

riage, be paid a fee, and thereafter obtain a divorce (*supra*, pp. 4-5). The second witness, Maria, had testified to an earlier marriage with Munio Knoll, and both her own testimony and that of Munio Knoll adduced a rabbinical divorce in 1942 or 1943 of such questionable validity, and a record of such extensive living together with Knoll subsequent to his ceremony with Osborne, as raised serious question whether Knoll had ever obtained a valid divorce from Maria and was even free to enter into a second marriage (*supra*, pp. 6, 11).¹⁵ Any alleviation of this doubt by Maria's and Knoll's self-serving assurances that their living together had been platonic, and that Maria had sometimes and somewhere lived as man and wife with Lutwak (*supra*, pp. 6, fn. 5; 9-11), was clearly outweighed by the evidence of others concerning Knoll's holding out of Maria as his wife (*supra*, pp. 7-8; and see R. 143). Moreover, there had already been introduced Knoll's earlier testimony before the immigration authorities in which he admitted that he had never had sexual intercourse with Osborne, had spent only part of one night in Paris with her, and had separated from her upon arrival in the United States (*supra*, p. 10).

Upon this posture of the evidence, the trial judge was clearly justified as a matter of law in concluding that it was a matter of "people going through something that is a mockery, which they did not intend to be a marriage" (*supra*, p. 11). The certificate that a ceremony had been gone through merely

¹⁵ If, as a matter of fact, Knoll was still Maria's husband at the time of the trial, he expressly waived his privilege to object to her testimony against him (*supra*, p. 5).

showed the admitted fact that the motions had been made. A sham ceremony does not establish a marriage. *United States v. Rubenstein*, 151 F. 2d 915 (C. A. 2), certiorari denied, 326 U. S. 766. It likewise serves as no basis for assertion of the privilege accorded by public policy for the preservation of a genuine marriage.¹⁶

3. Petitioners, and in some degree the court below, have obscured the issues by entering into extended analysis of whether foreign or domestic law would control the definition of a spouse under

¹⁶ Petitioners rely extensively on *Miles v. United States*, 103 U. S. 304, but the holding of that case that "a witness who is *prima facie* incompetent" (p. 314) cannot testify to her own competence is not applicable in a case such as this in which the *prima facie* case, and indeed all of the evidence except Munio Knoll's self-serving assertion, shows a mere sham marriage. In *Bassett v. United States*, 137 U. S. 496, also cited by petitioners (Pet. 14), there was no question as to the wife's status; the woman whose testimony was admitted against the husband in a polygamy prosecution was the first and lawful wife. The only question was whether polygamy was such an offense against the wife as would bring into effect the exception permitting a wife's testimony where the crime is against her. The decision was only to the effect that the exception was not applicable in polygamy (p. 506).

It may be noted that at the time of the trial judge's decision to admit Osborne's testimony the evidence conclusively showed that her marriage was a sham. And this posture of the evidence was characteristic, of course, of all that followed. Osborne's own testimony disclosed complete absence of any marital relationship with Knoll (*supra*, pp. 11-13), and even the self-serving statements of the conspirators disclosed further facts in support of the earlier evidence of Osborne's true status, e.g., Lutwak's recollection that it was Munio Knoll who had called for the meeting at which Osborne was paid \$1,000 (*supra*, p. 15).

the immigration law, and whether the person claiming the existence of a marriage or the person denying it should prove the state of the controlling law (Pet. 18-23; R. 396, 414). These questions are not reached. The evidence disclosed, and the jury necessarily found, that petitioners conspired to do acts that would not create a marriage but only an outward appearance of a marriage, in fraud of the immigration laws. Even if it be assumed that the parties would have been bound by the marriages under French law despite the fact that they did not so intend, there would at most have been a slip-up in the outcome contemplated by the conspirators. As a matter of fact, there was no such slip-up, since the false marriages were obliterated by the subsequent divorce proceedings. In any event, conspiracy is not negated by the failure to achieve all of its objectives, once overt acts have been taken to set it in course. The jury found petitioners guilty of conspiring in a course of conduct which was not to create a marriage, but merely to create a deceitful paper facade for the purpose of illegal entry into the United States. It is not incumbent on the Government to prove that the parties would not have been bound by the marriages had some of them later refused to carry out the conspiracy by declining to acquiesce in the divorces.

CONCLUSION

The decision below is correct and no real conflict of decisions is involved. It is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

JAMES M. McINERNEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

June 1952.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.

FILED

DEC 2 1952

HEROLD S. WINLEY, CLERK

No. 66

In the Supreme Court of the United States

OCTOBER TERM, 1952

**MARCEL MAX LUTWAK, MUNIO KNOLL, AND REGINA
TREITLER, PETITIONERS**

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

BRIEF FOR THE UNITED STATES

INDEX

| | Page |
|---|------|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Questions presented | 2 |
| Statutes involved | 3 |
| Statement | 5 |
| Summary of argument | 23 |
| Argument: | |
| I. Evidence that the spouses in each purported marriage lived apart from each other and proceeded to sever their formal ties by divorces after the entries into the United States was properly admitted against all the conspirators. | 32 |
| A. The evidence of which petitioners complain was admissible against all of them regardless of when the conspiracy ended. | 33 |
| B. In any event, the conspiracy did not end with the entries into the United States; it was clearly "within the scope of the unlawful project" that the purported spouses would live apart and be divorced, so that evidence of these facts was properly admitted against all the conspirators. | 42 |
| II. Upon a finding that the alleged marriages were "mockeries"—a finding fully sustained by the record—the trial court properly rejected the claim of privilege against a spouse's unfavorable testimony | 48 |
| III. Where the trial judge has properly rejected a claim that a witness is a party's spouse and permits her to testify against him, the witness may testify as to any material facts, including facts showing that she is not the party's spouse. | 57 |
| A. The asserted rule, that a witness found competent by the court may not testify on material factual issues which happen to coincide with issues affecting the witness' competency, has no basis in reason. | 59 |
| B. The decision in <i>Miles v. United States</i> is distinguishable; it should not in any event lead to the anomalous result petitioners seek | 62 |
| IV. The Government was not required to prove that the marriages were "invalid" under French law | 66 |

Argument Continued

Page

V. The trial court was not required in the circumstances of this case to charge that a second marriage is presumed to be valid where a prior marriage to a spouse still living has been shown

75

Conclusion

79

CITATIONS

Cases:

| | |
|---|------------------------------------|
| <i>Austin v. Tennessee</i> , 179 U. S. 343 | 72 |
| <i>Bennett v. State</i> , 100 Miss. 684 | 77 |
| <i>Cole v. State</i> , 92 Tex. Cr. 368 | 56 |
| <i>Comm. v. Boyer</i> , 7 Allen (Mass.) 306 | 77 |
| <i>De Vries v. De Vries</i> , 195 Ill. App. 4 | 73 |
| <i>Doss v. State</i> , 156 Miss. 522 | 56 |
| <i>Feigenbutz v. United States</i> , 65 F. 2d 122 | 42 |
| <i>Fleming v. People</i> , 5 Park. Crim. Rep. 353, affirmed, 27 N. Y. 329 | 77 |
| <i>Fletcher v. State</i> , 169 Ind. 77 | 77 |
| <i>Fuquay v. State</i> , 217 Ala. 4 | 76 |
| <i>Funk v. United States</i> , 290 U. S. 371 | 28, 65 |
| <i>Gila Valley Ry. Co. v. Hall</i> , 232 U. S. 94 | 57 |
| <i>Gregory v. Helvering</i> , 293 U. S. 465 | 72 |
| <i>Griffin v. United States</i> , 336 U. S. 704 | 49 |
| <i>Hayes v. United States</i> , 168 F. 2d 996 | 55 |
| <i>Hoxie v. State</i> , 114 Ga. 19 | 61 |
| <i>Kaul v. State</i> , 43 Okla. Cr. 56 | 56 |
| <i>Knauff v. Shaughnessy</i> , 338 U. S. 537 | 29, 67-70 |
| <i>Krulewitch v. United States</i> , 336 U. S. 440 | 33, 36, 38, 47 |
| <i>Lesueur v. State</i> , 176 Ind. 448 | 77 |
| <i>Long v. State</i> , 192 Ind. 524 | 76 |
| <i>Matz v. United States</i> , 158 F. 2d 190 | 65 |
| <i>McDonald v. United States</i> , 89 F. 2d 128, certiorari denied, 301 U. S. 697 | 45 |
| <i>Miles v. United States</i> , 103 U. S. 304, | 27, 28, 57, 58, 62, 63, 64, 65, 66 |
| <i>Moore v. State</i> , 45 Tex. Cr. 234 | 56 |
| <i>Parker v. State</i> , 77 Ala. 47 | 78 |
| <i>People v. Huntley</i> , 93 Cal. App. 504 | 76, 78 |
| <i>People v. Spoor</i> , 235 Ill. 230 | 76 |
| <i>People v. Stokes</i> , 71 Cal. 263 | 76 |
| <i>Pinkerton v. United States</i> , 328 U. S. 640 | 46 |
| <i>Prentis v. McCormick</i> , 23 F. 2d 802 | 78 |
| <i>Romankiewicz v. Romankiewicz</i> , No. 50S. 6904 Super. Ct., Cook County; Ill., October 17, 1951 | 16 |
| <i>Sneed v. United States</i> , 298 Fed. 911, certiorari denied, 265 U. S. 590 | 42 |
| <i>State v. Barrow</i> , 31 La. Ann. 691 | 77 |
| <i>State v. Chrismore</i> , 223 Ia. 957 | 56 |

Cases—Continued

Page

| | |
|---|---------------------------------------|
| <i>State v. Frey</i> , 76 Minn. 526 | 56 |
| <i>State v. Herron</i> , 175 N. Car. 754 | 77 |
| <i>State v. Martinez</i> , 43 Idaho 180 | 76 |
| <i>State v. Pinson</i> , 291 Mo. 328 | 77 |
| <i>State v. Sprague</i> , 135 Me. 470 | 43 |
| <i>United States v. Gonella</i> , 103 F. 2d 123 | 55 |
| <i>United States v. McGuire</i> , 64 F. 2d 485, certiorari denied, 290 U. S. 645 | 46 |
| <i>United States v. Rubenstein</i> , 151 F. 2d 915, certiorari denied, 326 U. S. 766 | 24, 26, 29, 39, 40, 47, 53, 67-69, 71 |
| <i>United States v. Walker</i> , 176 F. 2d 564, certiorari denied, 338 U. S. 891 | 50, 55 |
| <i>United States Bank v. Owens</i> , 2 Pet. 527 | 72 |
| <i>Yoder v. United States</i> , 80 F. 2d 665 | 50 |

Statutes:

| | |
|--|---|
| Act of May 26, 1924 § 22(c), 43 Stat. 153, 165, 8 U. S. C. (1946 ed.) 220(c) (now 18 U. S. C. (Supp. V) 1546) | 4 |
| Act of March 4, 1929, § 2, 45 Stat. 1551, 8 U. S. C. 180a | 4 |
| Act of December 28, 1945, c. 591, § 1, 59 Stat. 659, 8 U. S. C. 232 | 3 |
| Criminal Code, Sec. 37, 18 U. S. C. (1946 ed.) 88 (now 18 U. S. C. (Supp. V) 371) | 3 |

Miscellaneous:

| | |
|--|--------|
| American Law Institute, <i>Model Code of Evidence</i> ; Rule 1(8) and (12) | 38 |
| F. R. Crim. P., Rule 26 | 26, 55 |
| H. Rep. 1320, 79th Cong., 1st Sess. | 29, 69 |
| Morgan, <i>Functions of Judge and Jury in the Determina- tion of Preliminary Questions of Fact</i> , 43 Harv. L. Rev. 165, 183 (1929) | 37, 60 |
| S. Rep. 860, 79th Cong., 1st Sess. | 29, 69 |
| Underhill, <i>Criminal Evidence</i> (4th ed.), p. 1414 | 42 |
| 2 Wharton, <i>Criminal Evidence</i> (11th ed.), § 716 | 46 |
| 2 Wharton, <i>Criminal Evidence</i> (11th ed.), pp. 1185, 1186, 1200-1202 | 36, 44 |
| 1 Wigmore, <i>Evidence</i> (3d ed.): | |
| § 166 | 43 |
| § 268 | 38 |
| 2 Wigmore, <i>Evidence</i> (3d ed.), § 487 | 57 |
| 8 Wigmore, <i>Evidence</i> (3d ed.): | |
| § 2228 | 51 |
| § 2237(2), pp. 249-250 | 50 |
| § 2239, pp. 251-252 | 55 |
| § 2242 | 49 |
| 9 Wigmore, <i>Evidence</i> (3d ed.), § 2250 | 57 |

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 66

MARCEL MAX LUTWAK, MUNIO KNOLL, AND REGINA
TREITLER, PETITIONERS

v.

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The original opinion of the Court of Appeals (R. 391-400) and its supplemental opinion on rehearing (R. 404-414) are reported at 195 F. 2d 748.

JURISDICTION

The judgments of the Court of Appeals were entered January 3, 1952 (R. 401-403). A petition for rehearing was denied on April 16, 1952 (R.

415). The petition for a writ of certiorari was filed May 16, 1952, and was granted October 13, 1952 (R. 422). The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether evidence of conduct of some conspirators—relevant to the material issue whether certain representations, for which all the conspirators were responsible, were fraudulent—was admissible against all the conspirators.

2. Whether the separations of the purported spouses after entry into the United States and the arrangements to sever the purported marriages were part of the conspiracy so as to make evidence proving these matters admissible against all the conspirators.

3. Whether, upon the trial judge's conclusion from overwhelming testimony that a marriage was a sham (never consummated, never followed by cohabitation, and intended to be severed when it had served the purpose of effecting an alien's entry into the United States under the War Brides Act), a witness was properly permitted to testify against her purported husband.

4. Whether, where a disputed issue of fact bears on the competency of a witness and is also a material issue in the lawsuit, and where the judge has resolved the issue in favor of competency on evidence other than that witness' testimony, the witness is nevertheless incompetent to testify on that issue.

5. Whether the prosecution—having proved that the marriages were contracted solely for the purpose of effecting the entry of the aliens into the United States, and having proved that the facts of the scheme were concealed and misrepresented to the immigration officials—was required to prove that the marriages were “invalid” under French law.

6. Whether, when he instructed the jury that a bigamous marriage is void, the trial judge was required in the circumstances of this case to charge further that a second marriage with an earlier spouse living is presumed to be valid.

STATUTES INVOLVED

Section 37 of the Criminal Code, 18 U. S. C. (1946 ed.) 88 (now 18 U. S. C. (Supp. V) 371):

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both.

Act of December 28, 1945, c. 591, § 1, 59 Stat. 659, 8 U. S. C. 232:

* * * notwithstanding any of the several clauses of section 3 of the Act of February 5, 1917, excluding physically and mentally defective aliens, and notwithstanding the docu-

mentary requirements of any of the immigration laws or regulations, Executive orders, or Presidential proclamations issued thereunder, alien spouses or alien children of United States citizens serving in, or having an honorable discharge certificate from the armed forces of the United States during the Second World War shall, if otherwise admissible under the immigration laws and if application for admission is made within three years of the effective date of this Act, be admitted to the United States * * *.

Act of March 4, 1929, § 2, 45 Stat. 1551, 8 U. S. C. 180a:

Any alien who hereafter enters the United States at any time or place other than as designated by immigration officials or eludes examination or inspection by immigration officials, or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall be guilty of a misdemeanor and, upon conviction, shall be punished by imprisonment for not more than one year or by a fine of not more than \$1,000, or by both such fine and imprisonment.

Act of May 26, 1924, § 22(c), 43 Stat. 153, 165, 8 U. S. C. (1946 ed.) 220(c) (now 18 U. S. C. (Supp. V) 1546):

Whoever knowingly makes under oath any false statement in any application, affidavit, or other document required by the immigration laws or regulations prescribed there-

under, shall, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both.

STATEMENT

The petitioners seek reversal of judgments of the Court of Appeals for the Seventh Circuit (R. 401-403) unanimously affirming the judgment of the District Court for the Northern District of Illinois imposing sentences of two years' imprisonment and fines of \$10,000 on each of them (R. 366-367) upon the verdicts of the jury (R. 358-360) finding petitioners guilty as charged in the first count of a six-count indictment.¹ That count charged petitioners and two others, Leopold Knoll and Grace Klemtner,² with conspiracy to commit substantive offenses set forth in the remaining counts, and conspiracy to defraud the United States of and concerning its governmental functions and rights with respect to the immigration laws and the Immigration and Naturalization Service (R. 4-9). The conspiracy was alleged to have comprehended the following ostensible marriages in Paris: Marcel Lutwak to Maria Knoll, allegedly divorced wife of Munio Knoll; Bess Osborne to Munio Knoll; Grace Klemtner to Leopold Knoll.

It was alleged that a conspiracy was begun on or about July 1, 1947, under which Marcel Lutwak, Bess Osborne, and Grace Klemtner, all unmarried

¹ The remaining counts were dismissed for want of venue (R. 291, 302, 333).

² Leopold Knoll was acquitted (R. 361) and the indictment was dismissed as to Grace Klemtner (R. 224-225, 333).

citizens of the United States and veterans of the second world war, would journey to Paris and go through the form of a marriage ceremony with three aliens residing in Paris, as mentioned above; that the three aliens would then enter the United States as nonquota immigrants, falsely representing themselves in the applications for admission as being married, and concealing and "omitting to state to [the Immigration Service] at the time of making said application [their] intention and understanding that [they] would not be, or in fact live together," as man and wife but would sever the ostensible ties as they saw fit. It was further charged that, as a part of the conspiracy, the conspirators "would at all times subsequent to the formation of the said conspiracy conceal such transactions and acts aforesaid and would do such other, further and different acts as they might deem necessary and expedient to prevent the disclosure to the United States Immigration and Naturalization Service of the existence of said conspiracy" (R. 5-7, 10). The specified 21 overt acts covered a period from 1947 to 1950 and included, *inter alia*: conversations of Treitler in the late summer of 1947 with respect to obtaining spouses for the Knolls; the trips to Paris of the American alleged spouses and the going through the form of marriage ceremonies there; the entries into the United States; the residing together of Munio Knoll, ostensible husband of Osborne, and Maria, the ostensible wife of Lutwak; the conversation of Lutwak and Munio Knoll with Bess Osborne,

Munio's ostensible wife, in November 1947, in which the latter was paid \$1,000; and the divorce on March 31, 1950, of Lutwak and his ostensible spouse, Maria (R. 7, 14, 30-32, 206).

At the trial, the Government's first witness, Anne Zapler, testified that in the late summer of 1947 petitioner Regina Treitler twice asked her whether she "knew of any girls who could go to Europe and marry her brother and bring him here to the States," the girl to have her way paid and to receive a fee and "at the end of the period of six months, they could be divorced and they would not have to consummate the marriage" (R. 29-31, 37-38). Later, Zapler had a conversation with Lutwak, a nephew of Treitler, regarding the same matter but she did not recall what it might have been (R. 31). In September 1947, Zapler introduced Bess Osborne to Lutwak, mentioning that Osborne was an ex-Wave (R. 31-33). Later in September, Treitler expressed her happiness over the fact that Osborne "had consented to go," upon the apparent assumption that the ex-Wave was to marry Leopold Knoll (R. 35).³

The Government's second witness, Maria Knoll, who had entered the United States as Lutwak's ostensible wife had been divorced by Lutwak before the trial (R. 69-70, 91-92). She had been married in 1932 to Munio Knoll, who was Lutwak's uncle (R. 60, 71-72), but Knoll's counsel interposed

³ The Zapler testimony was at first admitted only against Treitler and Lutwak, respectively (R. 30, 32, 35) but, upon further testimony of more witnesses, indicative of a conspiracy, was admitted against all the defendants (R. 141).

no objection to her testimony, contending that Maria had been validly divorced from Knoll in 1942 (R. 52). She testified on direct examination as follows:⁴

She first met Lutwak in Paris at the end of July or beginning of August 1947, being introduced to him by an uncle, as well as by Munio and Leopold Knoll, and by a cousin Charlotte (R. 60-61). She went through a civil marriage ceremony with Lutwak in Paris on August 31, 1947, in the presence of Munio Knoll and the cousin Charlotte (R. 60). She never received a wedding ring from Lutwak (R. 62). On September 9, 1947, she entered the port of New York as a bride of a United States serviceman; she signed the application for admission (Govt. Ex. 1),^{4a} but the data therein were written out by Lutwak, including the representation that the "name and address of person to whom destined in the United States" was "Husband Max Marcel Lutwak, 3543 West Madison Street, Chicago" (R. 62-63, Govt. Ex. 1).

On September 10, she arrived in Chicago and resided with Regina Treitler at 35 South Central Park and another relative at 3532 West Adams for about three months. At no time during this period or any later period did Lutwak live in the same house or apartment with Maria. Munio Knoll lived at the Treitler home commencing with the middle of November 1947, during Maria's stay there. There-

⁴ Her testimony was admitted as against all the defendants (R. 287).

^{4a} The exhibits have not been printed in the record but have been filed in their original form with this Court.

after, Maria resided in Munio Knoll's apartment on Maypole Street, except for a few months spent in New York, until November 1948, and thereafter in New York until the date of the trial (R. 65-69).⁵

Wicker, owner of the Maypole Street property, testified that about Christmas of 1947 Treitler phoned her about an apartment, and later appeared there with Lutwak, Maria, and Munio Knoll. Maria was introduced as "Mrs. Lutwak" and she paid the rent for about two months. Thereafter, Munio Knoll "took the apartment" and resided there. Maria left the apartment at the time Knoll rented it, but returned a few months later. In the summer of 1948, when Maria and Munio Knoll visited the Wickers in South Haven, Michigan, they shared the same room overnight. (R. 139; 141-144).

Two business associates of Munio Knoll subsequent to his entry into the United States, Ludmer and Haberman, the former's wife being first cousin to Knoll, each testified that Treitler told them that she had "helped [Munio and Leopold Knoll] come to this country by getting girls and paying them off" and that she "paid off a thousand dollars each" (R. 93, 96-97, 118, 180).⁶

⁵ On cross-examination, Maria stated that she was acquainted with Lutwak for about four weeks before the marriage ceremony, that there had been a courtship, that she fell in love, that there was no talk in Paris of getting a divorce, that she lived with Lutwak as husband and wife at all of the Chicago addresses, that the marriage was "consummated," and that she had never lived with Munio Knoll as husband and wife after her marriage to Lutwak (R. 76-78, 82, 84-85, 90). The jury was entitled, of course, to disbelieve this testimony in view of Maria's direct testimony and the other evidence.

⁶ The Treitler statements in the presence of Ludmer were made in a conversation which included Lutwak and Munio

In conversation with Haberman in New York in late November and early December 1947, Munio Knoll stated, in the presence of Lutwak, that he and Lutwak were awaiting the arrival of Leopold Knoll. He explained the speed of his own entry into the United States and that of Leopold as follows: "[W]hen you have the right connections and are willing to spend money you can pave your way very quickly." "You see how easy it is to come to the United States if you know how." (R. 151-153, 160). Knoll also referred to Maria as his wife, and Lutwak stated himself to be unmarried (R. 153).⁷

Ludmer considered the Maypole Street apartment, during January 1948 and the early part of February, as the residence of Maria and Munio Knoll (R. 94-95) and knew Maria as "Mrs. Knoll" (R. 103, 118). He picked up Knoll on the way to business almost daily and saw only Maria and Knoll at the apartment in the mornings (R. 104-105). On one Sunday in early February 1948, after an evening at the Treitlers', he took Maria to the Maypole Street address and Lutwak to "his home" at another address (R. 104).⁸

Knoll, and were admitted only against Treitler, Lutwak and Munio Knoll (R. 94, 283); the Treitler statement made to Haberman was admitted only against her (R. 180, 288).

⁷ These conversations were admitted only against Munio Knoll and Lutwak (R. 152, 167, 174).

⁸ There was testimony, admitted only against Munio Knoll, that in February 1948 Knoll rushed to Chicago after receiving a telephone call in New York (R. 162-165), that he subsequently reported that he had difficulty in getting into his Chicago apartment and that, when he got in, Lutwak jumped through the window (R. 98-99, 101-103). Thereafter, Maria

In June 1948, Haberman saw Maria with Knoll at the Maypole Street apartment, including an early morning sight of them in bed together (R. 176-179). Maria was always known as Munio Knoll's wife to Haberman, and never as Mrs. Lutwak (R. 181). In September, 1948, after an altercation with Munio Knoll on another matter, in which Haberman accused Knoll of illegal entry into the United States, Knoll asked him not to speak about his illegal entry and that of the others to anybody (R. 174-175).⁹

Subsequent to the foregoing testimony, the United States Attorney read into the record the sworn testimony of Munio Knoll before immigration officers given on November 24, 1948, and January 4, 1949. The statements were received in evidence only against Munio Knoll (R. 185, 282, 332-333; Govt. Exs. 13 and 14), and disclosed the following:

Knoll had first testified in the immigration service investigation that he had obtained a court divorce from Maria in Budapest in 1942 on the ground that he and Maria were second cousins (Govt. Ex. 13, p. 5). He later testified that the divorce was a "Jewish divorce," not a court di-

went to New York (R. 102). In April and again in May 1948, Haberman saw Maria and Munio Knoll at a New York hotel and when he urged Knoll to become reconciled with Maria, Knoll replied that it was not so simple after having come back suddenly from New York and "found her with another man" (R. 165, 169). In the second conversation Knoll thought he might get together again with Maria (R. 169).

⁹ This conversation was admitted only against Munio Knoll (R. 175).

vorce (Govt. Ex. 13, p. 11; Govt. Ex. 14, p. 4). Still later, he testified that the reasons given had been sexual incompatibility, the separation of Maria from him, the absence of any children, and the concealment of identity from the Nazis (Govt. Ex. 14, p. 3). He could not produce the divorce decree (Govt. Ex. 13, p. 11) but testified that he had exhibited it to the Paris officials at the time of his ostensible marriage to Bess Osborne in 1947 (p. 7).¹⁰ After the rabbinical divorce he and Maria went to different towns in Hungary (Govt. Ex. 13, p. 13). They were apparently together in Roumania, Maria allegedly being employed by him there (Govt. Ex. 14, p. 6). She preceded him to Paris in 1947 by three months and lived "on her own money" there, including money which Knoll paid her by reason of his employment of her in Roumania (*Id.*, pp. 5, 6). Knoll reached Paris in June 1947. He denied that he held out Maria as his wife or lived with her. He denied that he knew of any ulterior purpose in her marriage to Lutwak, although he had stated to her "that she should marry [Lutwak] as it was the only way she could gain entry into the United States" (*Id.*, pp. 5-6). He denied any payments or promises to Lutwak (*Id.*, pp. 7, 25-26). He further denied that there was any discussion looking toward his

¹⁰ He explained the fact that his prior divorce did not appear in the 1947 marriage certificate, although that of Osborne was stated (see Dfts. Ex. A), on the basis that he had not thought it necessary to direct the attention of the Paris authorities to the divorce, since he had assumed they would note it from the decree he had left in the papers deposited by him (Govt. Ex. 13, p. 13).

following Maria to the United States. He testified that although the United States relatives wanted him to "reunite" with Maria, he wrote to them that he neither wanted to go to the United States nor rejoin Maria (*Id.*, p. 6).

With respect to the period of approximately a week from the time of Osborne's arrival in Paris to the date of his ostensible marriage with her,¹¹ Knoll testified, "I was living in a hotel where all the Americans congregated and she was living in that hotel and I got to know her. I showed her Paris. * * * [N]obody introduced me" (Govt. Ex. 13, p. 7). He asserted that the marriage was "consummated" in Paris but that he had never had sexual intercourse with Osborne, and had spent only part of one night in Paris with her (Govt. Ex. 14, p. 13), and that they separated upon arrival in the United States (*Id.*, p. 24).

Knoll further testified in the immigration service investigation that, about three days after his arrival in Chicago, Lutwak asked Knoll to meet him and Osborne at the Admiral restaurant, since Osborne needed money. Knoll went to the restaurant, desiring to be present at any payment of money, because he had heard that a portion of an aggregate sum of \$10,000 he had sent to a sister in New York, had been diverted to Lutwak. He saw Lutwak deliver a check to Osborne but testified that he knew nothing of its amount or the source of the money (Govt. Ex. 14, pp. 7-8, 10, 14-15).

¹¹ Osborne left Chicago for Paris by plane on October 25, 1947 (Govt. Ex. 8). The marriage ceremony took place on November 3, 1947 (Dft. Ex. A).

He testified that he had moved to the Maypole Street apartment in Chicago on December 24, 1947, and that Maria left when he moved in, but returned for a few days and did not live there "the whole time." He asserted that the living together with Maria was never as man and wife. (Govt. Ex. 13, pp. 11-12, Govt. Ex. 14, pp. 25-26.)

After the reading into evidence of Munio Knoll's statements, Osborne, over objection of defense attorneys, was permitted to testify. The trial judge ruled that in the case of "people going through something that is a mockery, which they did not intend to be a marriage", foreign law would not be presumed to grant the status of spouse, for purposes of the privilege against a spouse's unfavorable testimony (R. 187, 189). Osborne testified, *inter alia*, as follows:

She was introduced to Lutwak early in September 1947 by Zapler. Lutwak told her he had an uncle Leopold Knoll in Europe whom he wanted to bring to the United States, that he wanted a woman who had been in the service to marry the uncle for the purpose and would pay her \$1,000, and that after six months the ostensible spouse could have a divorce. About a week later, Osborne met Treitler at the latter's home with Lutwak and Maria present. Treitler urged the sympathetic aspects of the project upon Osborne (R. 192-195, 202).

About the end of September, Lutwak and Osborne had further talks, arranging the details of

her trip and the payment of \$500 for expenses and \$100 for clothes. Lutwak asked Osborne to marry Munio instead of Leopold Knoll, so that Munio could be reunited with his former wife Maria. Lutwak accompanied Osborne when she applied for her passport. (R. 195-198, 219-220) Osborne met Treitler again at the Chicago airport on October 25, 1947, when the two left for Paris. Osborne did not pay for her own ticket. Lutwak and Maria were also present. At Paris, the next day, Osborne and Treitler were met by Munio Knoll and a relative of the Knolls, Wireberg. Treitler introduced Osborne to Knoll. They stayed at the Khedive hotel, where Knoll also stayed. During the week following their introduction, Osborne and Knoll went to a lawyer's office where all arrangements for the marriage ceremony were made. The ceremony took place on November 3, 1947, at the Paris City Hall, in the presence of Leopold Knoll and Wireberg. No wedding ring was given Osborne either then or thereafter. (R. 191-192, 197-199.)

After the ceremony, Osborne lived by herself at the Khedive and later at another hotel. During this time Treitler told her, several times, that she would receive \$1,000 (R. 200-201). On November 12, 1947, Munio Knoll and Osborne left Paris, arriving in New York on November 13, where Knoll applied for admission as a nonquota immigrant (R. 202-204). In the application for admission, after the heading "Name and address of person

to whom destined in United States" Knoll's destination was stated as "Wife Bessie Benjamin Osborne Romankiewicz,¹² 35 So Central Park Ave., Chicago; Illinois."¹³ The application was filled out in part by an immigration officer who talked with Osborne and with Knoll, to the latter in German. After the discussion, Knoll was asked to sign the application. Osborne and Knoll arrived in Chicago that night. Lutwak and Maria were among the group at the airport. Lutwak and Osborne went by cab to a hotel, Lutwak again informing Osborne that she would get \$1,000. Knoll went elsewhere with the others. About three days later, Osborne, Lutwak, and Munio Knoll met at the Admiral restaurant, where Lutwak gave Osborne a \$1,000 check signed by Lutwak. (R. 203-207, 211-213; Govt. Ex. No. 2.)

About six months later, Osborne discussed a divorce with Knoll, and Knoll asked her to wait two years "because he wanted to become an American citizen." On May 3, 1950, Osborne filed her petition for divorce.¹⁴ In November 1950, Knoll asked

¹² This last name was one used by Knoll during 1941 and subsequently (Govt. Ex. 13, p. 11).

¹³ This was Treitler's address (R. 65). Osborne apparently never lived there, nor did she stay elsewhere with Knoll (R. 210, 213).

¹⁴ The petition included an allegation that Osborne had "lived and cohabited" with Knoll until his desertion of her on November 15, 1947 (Dft. Ex. B). Osborne testified that she had not read the text of her petition and would not have signed had she noted the statement (R. 214, 221-222). On October 17, 1951, following the trial of this case, her divorce was granted. *Romankiewicz v. Romankiewicz*, No. 50S6904, Super. Ct., Cook County, Ill.

her to wait until after the conspiracy trial ¹⁵ (R. 209).

At no time did Munio Knoll ask that the ostensible marriage be "meant" or be followed by living together (R. 215). At no time subsequent to the ceremony did Osborne use the ostensible married name and, according to the understanding, she was not to use the name. The marriage was never "consummated." Munio Knoll never contributed to Osborne's support and Osborne never lived with him. (R. 209-210, 213-220.)

Grace Klemtner was then called as a witness of the court, upon the Government's expression of unwillingness to vouch for her, and over-objection that she was the wife of Leopold Knoll (R. 224-226).¹⁶ She testified to substantially the same chronology of events already in evidence; i.e., her departure for Paris on November 1, 1947 (R. 228); the form of a marriage ceremony on November 6 (R. 245); Leopold Knoll's entry into the United

¹⁵ This conversation was admitted only against Munio Knoll (R. 209).

¹⁶ One Jane Turner had previously testified that she saw Grace Klemtner off to Europe at the Chicago airport in December 1947 and met her upon her return at the New York airport as the ostensible Mrs. Leopold Knoll (R. 132-134). Present upon Klemtner's return with Leopold were Munio Knoll and Lutwak (R. 134). Klemtner told Turner that Leopold was ill (R. 137). The two women went from the airport to a New York hotel, where they stayed for three days. Thereafter they went to Los Angeles, where they resided together in various apartments until the time of the trial. At no time did Leopold Knoll reside with Klemtner and Turner. In Los Angeles, Grace used the last name "Klemtner" but received mail under the name "Knoll" as well as "Klemtner." She received letters and money from Leopold Knoll from time to time (R. 134-138).

States with her on December 5 (R. 251); her residing with Turner at all times thereafter in New York, Chicago, and Los Angeles up to the time of the trial (R. 254-256). Klemtner further testified that she had known Treitler for many years and saw her three or four times a year at meetings of a women's organization to which both belonged. She had seen Treitler a few weeks before November 1, 1947, and Treitler arranged a hotel reservation in Paris for her, but made no suggestions concerning Klemtner and the brothers in Paris and never paid her any money (R. 228-30, 232). Klemtner first met Lutwak in 1946.¹⁷ She testified that he had nothing to do with her trip, never paid her any money, never informed her of his own trip and marriage. He was present when Klemtner applied for a passport, and he took her and Turner to the airport (R. 232-234, 237-238, 247). In a later portion of her testimony, she refused to answer the question whether she had talked to Treitler or Lutwak about Leopold Knoll before leaving Chicago, asserting the privilege against self-incrimination (R. 247). She also refused to testify, on the grounds of self-incrimination, as to the source of the money for her round-trip plane fare (R. 242).

In conclusion, sworn statements to the immigration authorities by petitioners Treitler and Lutwak and by Leopold Knoll were read into evidence

¹⁷ Klemtner offered no explanation of the statement in Lutwak's affidavit on Klemtner's passport application that he had known her for four years (R. 238-239).

and admitted, in each case, only against the defendants who had made them (R. 273-275, 282, 332-333, Govt. Exs. 15-18).

Lutwak refused to testify before the immigration authorities concerning Maria (Govt. Ex. 15, p. 4). He did testify ~~that~~ he had met Osborne at Treitler's home, that the whole family had asked him to speak to Osborne about marrying his uncle, and that there was a general "understanding" that Osborne would marry Munio "if they liked each other" (*id.*, pp. 5-6, 10-13).

With respect to the payment to Osborne of \$1,000 in November 1947 at the Admiral restaurant, Lutwak "vaguely" recalled that Munio Knoll had called for the meeting and directed this application of money held for him by Lutwak. He did not recall whether the money was payment for the ostensible marriage. Lutwak stated that he himself had never paid or been paid or promised anything in connection with the ostensible marriages (*id.*, pp. 15-17).

Treitler testified before the immigration authorities that she knew Munio was unhappy because of his divorced status and she spoke with Osborne about him in the hope of making him happy (Govt. Ex. 16, p. 4; Govt. Ex. 17, p. 3). She stated that she could not recall whether Osborne was her guest on the Paris trip, and did not remember an agreement to pay \$1,000 to Osborne (Govt. Ex. 16, p. 4; see also Govt. Ex. 17, pp. 3-4). In reply to questions whether there had been an earlier suggestion that Osborne would marry Leo-

pold rather than Munio Knoll, whether other sisters assisted financially in bringing the relatives to the United States, and whether she had ever talked with Grace Klemtner about a trip to Paris to meet the brothers, her response was that she could not remember (pp. 4-6).

The judge's instructions to the jury included the following:

Certain statements, allegedly made by the defendants in this case, have been received in evidence and read to you, in whole or in part. You are instructed that these statements are not to be considered by you as evidence against any defendant other than the defendant who made the statement [R. 332-333].

* * *

During the trial, evidence has been admitted only as to certain defendants. You may consider that evidence, so limited, only as to those defendants, and not as to other defendants.

* * * The declarations, statements and conversations of one or more defendants, made out of the presence of the other defendants, is not binding upon any other defendant, unless the evidence—not including any of such declarations, statements or conversations other than his own—shows, beyond a reasonable doubt, that such other defendant was a participant in the conspiracy charged in the First Count of the indictment at the time of such declarations, statements or conversations, and unless, further, the declarations, state-

ments and conversations were in furtherance of the conspiracy and made during its continuance. * * * [R. 337-338].

* * *

* * * In considering whether or not a particular defendant was a member of the conspiracy, you must do so without regard to and independently of the statements and declarations of others. In other words, you must determine the membership of the particular defendant from the evidence concerning his own actions, his own conduct, his own declarations, or his own statements, and his own connection with the actions and conduct of others. [R. 341].

* * *

The mere knowledge, acquiescence, or approval of an act, without cooperation or agreement to cooperate, is not enough to constitute one a party to a conspiracy. * * * [R. 342].

* * *

* * * It is a question of fact based upon the evidence in this case for the jury to determine whether or not at the time the aliens entered into the United States under the provisions of the United States Code they were in fact entering as man and wife and to thereafter reside in the United States as man and wife. [R. 338].

* * *

The marriage of a man and woman where one of the parties thereto has a husband or

wife by a prior marriage who is then living and undivorced is void.

Mutual consent is necessary to every contract and no matter what forms of ceremonies the parties may go through indicating the contrary, they do not contract if they do not in fact assent, which may always be proved. Marriage is no exception to this rule: a marriage in jest is not a marriage at all. It is quite true that a marriage without a subsequent consummation will be valid; but if the subjects agree to a marriage only for the sake of representing it as such to the outside world and with the understanding that they will put an end to it as soon as it has served its purpose to deceive, they have never really agreed to be married at all. They must assent to enter into the relation as it is ordinarily understood, and it is not ordinarily understood as merely a pretense or cover to deceive others.

You are hereby instructed that it is for you, the jury, to determine from all of the facts in evidence what the intentions of the parties were at the time the marriage ceremonies were performed. [R. 339].

* * *

* * * It is sufficient if the parties intend immediately to be bound permanently, even though they do not intend forthwith to assume all the duties and responsibilities of marriage. Moreover, once there is this meeting of the minds and the marriage ceremony required by

law is performed, the marriage is complete and the status of the parties as married becomes fixed by law, even though they immediately repudiate the agreement and thereafter act in total disregard of their marital rights and duties.

Although the cohabitation of the parties, subsequent to the marriage, is evidence of the existence and reality of their consent, cohabitation is not necessary to the validity of the marriage. Nor is a marriage invalid merely because it has not been consummated.

If the consent of the parties is plainly expressed, a secret reservation of one of the parties will not invalidate the marriage, nor will the fact that one of the parties gave his consent to the marriage because of some ulterior motive or motives invalidate it. If the essentials of capacity and consent are present, the marriage is valid, even though one of the parties consented because he expected some material advantage as the direct consequence of his entering into the marriage. The mere fact that one of the parties to a marriage knew and expected that by reason of entering into the marriage his coming to the United States would be facilitated does not in and of itself render the marriage invalid. [R. 340].

SUMMARY OF ARGUMENT

I

A. Even accepting the erroneous assumption that the conspiracy ended with the entries of the

alien "spouses" into the United States, evidence that the parties did not thereafter live together or act married was relevant and therefore admissible. Because the substantial issue presented relates to evidence of acts, not declarations, the question as to admissibility turns on the problem of relevance, not hearsay.

The nature and purpose of the marriages, the intentions of the parties with respect to the marriages, and the truth of the representations that they were husbands and wives who intended to live together were clearly material issues on any theory of the conspiracy's duration. Because it was obviously relevant to these issues, the evidence that the parties lived apart and acted unmarried after entering the United States was admissible against all conspirators. Similarly, the fact that early arrangements were made for severing the formal marriages by divorce was relevant and admissible against all. *United States v. Rubenstein*, 151 F. 2d 915 (C. A. 2), certiorari denied, 326 U. S. 766.

It is not the law that evidence of the acts of one party is admissible against another only where the former is an agent or co-conspirator of the latter. For example, if it is material in a lawsuit against *A* that *B* and *C* were once married, evidence that *B* and *C* lived together and acted married is admissible against *A* because it is obviously relevant under settled principles of the law of evidence. These principles apply here. They refute the contention that the evidence petitioner's attack as post-dating the conspiracy was improperly admitted.

B. In any event, the conspiracy did not end with the entries into the United States. It was clearly part of the scheme that the purported husbands and wives would live apart and be divorced, so that evidence of these facts was admissible against all the conspirators.

From its inception, it was clear that successful fulfillment of the conspiracy required the separations and divorces of the ostensible spouses. Like the division of spoils among thieves or the collection of insurance proceeds after a murder for profit, these steps in carrying the scheme to completion were essential parts of the conspiracy. Accordingly, evidence proving these steps—whether acts or declarations—as properly admitted against all the conspirators.

II

While there are powerful arguments for abolishing the privilege against a spouse's unfavorable testimony—just as the rule forbidding husbands and wives to testify for each other has been abolished—there is no occasion here to reach this broad problem. Accepting the privilege as still available in a proper case, the trial judge's ruling against it, following overwhelming testimony that the marriages were sham forms, was clearly justified.

The basis for the privilege has been the belief that marital trust and harmony would be threatened, and basic notions of fairness offended, by permitting one spouse to testify against the other. These considerations have no place where the forms

of marriage have been employed only for deception—where the purported spouses have never lived or intended to live with each other and where the “marriage,” as soon as its deceptive purpose was accomplished, was intended by the parties to be dissolved by divorce. In every sense of the word which has any relevance to the privilege asserted, the “marriages” in this case were not “marriages” at all. *Cf. United States v. Rubenstein, supra*, at 918-919. Nor is it necessary, in determining whether this American privilege claimed in an American court was properly denied, to inquire as to the consequences under French law of the empty forms the parties created. What is decisive is that the evidence thoroughly proved the absence of any factual basis for the privilege.

If the common law could be interpreted to extend the privilege, incongruously, to situations like the one presented here, we submit that there is no basis in “reason and experience” (Rule 26, F. R. Crim. P.) for application of any such interpretation in the federal courts. Beyond this, there is no suggestion of a need in this case to determine whether the privilege should be altogether discarded.

III

A. If the claim of privilege was properly denied, there was no reason to hold the alleged spouse incompetent to testify to facts proving the character and purpose of the alleged marriage—facts which happened to be material in the case as well as determinative of the issue of competency. The question

of competency was for the judge and had to be resolved by him before the witness could be heard by the jury at all. Once such a claim of privilege has been rejected by the court, the witness is competent to give testimony on all manner of damaging issues, and the weight of such testimony is neither lessened nor enhanced by the prior dispute, in which the jury plays no part, as to competency. There is no basis in reason—and petitioners make no attempt to suggest one—for the asserted rule that such a witness may not testify on issues which, in addition to being material in the action, were earlier required to be resolved by the judge before the witness could testify.

B. While the decision in *Miles v. United States*, 103 U. S. 304, appears on its face to support petitioners' contrary view, it is distinguishable. In the first place, the opinion in *Miles* strongly suggests that the trial judge there failed to make the necessary determination of competency, through witnesses other than the alleged spouse, before permitting her to testify. Accordingly, this Court said that when this witness was permitted to give testimony tending to prove the defendant's prior marriage—which was not only the issue bearing on her competency but also the sole contested issue determinative of whether the defendant was guilty of the charge of bigamy—her evidence was serving both to prove defendant's guilt "and at the same time to establish the competency of the witness." 103 U. S. at 315. Obviously, however, if her competency had not already been established, the wit-

ness should not have been permitted to testify at all. There is no comparable problem in the present case where competency was fully established by other witnesses before the witnesses whose testimony is complained of were called. 7

Another possible distinction of *Miles* is that the law applicable there permitted the testimony of spouses either for or against each other. It followed that, in a prosecution for bigamy, an alleged second wife could not logically have given testimony to disprove the alleged first marriage, for this would at the same time tend to prove the legality of her marriage and, therefore, her incompetency to give the testimony. Judging from the authorities cited in *Miles*, this logical difficulty led to the rule prohibiting any testimony by an alleged second wife either to prove or disprove the contested assertion of a valid prior marriage. Since the disqualification of spouses to testify for each other has been abolished (*Funk v. United States*, 290 U. S. 371), the former dilemma which may have led to the rule of the *Miles* case no longer serves as a possible justification for the rule.

We submit, in any event, that the result for which petitioners invoke the *Miles* decision should not be applied here. Apart from the differences in fact and legal context, the *Miles* decision, on the limited issue touching this case, appears to have been forgotten in the intervening years, at least as far as the federal courts are concerned. We submit that if *Miles* is to be read as announcing the rule petitioners assert—a rule which, today, at any rate,

appears to be without reason—that decision should be, in this narrow respect, limited to its peculiar facts.

IV

The Government was not required to prove that the marriages in question were “invalid” under French law. The forms of marriage were used as forms only, solely to represent the aliens as “spouses” under the War Brides Act. The legal consequences of such forms were not only unsought and undesired by the parties, but were intended to be avoided, as soon as their deceptive purpose had been served, by prompt divorces. Accordingly, whether the forms were French or American is unimportant; they were frauds in either event. *United States v. Rubenstein, supra.*

Extended discussion is unnecessary to show that the “spouses” for whom Congress relaxed immigration restrictions in the War Brides Act were not such “spouses” as these. Moved by the “strong equities [which] run in favor of * * * service men and women in the right of having their families with them” (H. Rep. 1320, 79th Cong., 1st Sess., p. 2; S. Rep. 860, 79th Cong., 1st Sess., p. 2) and by the “dominant regard which American society places upon the family” (*Knauff v. Shaughnessy*, 338 U. S. 537, 549, dissenting opinion of Mr. Justice Frankfurter), Congress lowered the ordinary bars to immigration so that alien spouses could come to live and raise families with the soldiers they had married.

Conspiring to misrepresent the aliens in this

case as such spouses and to state falsely that these aliens were entering to live with the ex-soldiers they had married, petitioners committed the offense of which they were convicted regardless of what the French law of marriage may be. It may be, for example, that these marriages were "valid" under French law, as they were under American law, in the sense that a court of equity, knowing the facts, would not aid the conspirators to complete their fraudulent scheme with divorces or annulments. But this kind of "validity," the effect of which petitioners avoided by seeking divorces on the ground of "desertion" without disclosing the fraud in which the "marriages" were conceived, scarcely aids petitioners. Indeed, it only serves to point up the fraudulent character of the purported marriages. That a marriage ceremony is designed to have consequences which the parties here intended to avoid cannot alter the material facts of conspiracy to misrepresent and conceal upon which petitioners were convicted. The result is the same where the legal forms employed for the deception are French as it is where they are American.

V

It was undisputed that Munio Knoll and Maria had been married in 1932. Munio first told the immigration authorities that this marriage had ended in a civil divorce; later he claimed a rabbinical divorce; but he never produced the document, which he claimed to have, showing a divorce of some kind. Munio's certificate of mar-

riage to Bess Osborne in 1947 showed that she had had a prior marriage and divorce, but made no similar statement as to him. In addition to these facts, the Government proved that Munio and Maria, not Munio and Bess, lived together and represented themselves as husband and wife after entering the United States.

• This evidence fully justified the instruction that a bigamous marriage is void. And petitioners err in contending that the court should also have charged that the earlier marriage was presumed to have ended in a valid divorce. In criminal prosecutions for bigamy, it is sufficient if the prosecution shows a valid marriage and a later marriage or act of adultery while the spouse in the (first) marriage is alive. There is no presumption of divorce in such cases and the prosecution is under no burden to prove the sweeping negative fact that there has been no divorce. If there has been a divorce, the defendant is peculiarly able to prove it, and the burden is upon him to do so.

This rule is plainly applicable to the prosecution in this case. The presumption petitioners invoke of the validity of a second marriage may apply in civil cases where a marriage is collaterally attacked, ordinarily where the party who could defend against the attack upon the marriage is not before the court. Even this type of presumption may well disappear in a case where evidence such as the Government produced here has been presented. • Aside from this, however, the analogy

from civil cases upon which petitioners rely is clearly inapposite.

ARGUMENT

I.

Evidence That the Spouses in Each Purported Marriage Lived Apart from Each Other and Proceeded to Sever Their Formal Ties by Divorces After the Entries into the United States Was Properly Admitted against All the Conspirators

Summarized briefly, but sufficiently for present purposes, major elements of the Government's case against the petitioners were misrepresentations to immigration officials (1) that the purported "war brides" intended to live with their purported spouses, and (2) that the immigrant spouses had been "married" in the ordinary sense, and had not merely participated in marriage ceremonies for the sole and exclusive purpose of securing entry into the United States. To prove that the parties to each marriage did not actually intend to live together, the Government adduced evidence that they separated promptly upon arrival in the United States and continued to live apart thereafter. To prove that the purported marriages were shams, the Government proved that the spouses, living apart, never acted married; that divorce proceedings, contemplated from the outset, were begun with the dispatch appropriate to the conspirators' purposes; and that petitioner Munio Knoll and Maria Lutwak (Knoll), members of two of the ostensible marriages, acted after arrival here as if they were married to each other, as they had at least once been.

Without questioning the materiality of the misrepresentations this proof was designed to establish, petitioners contend (Br. 25-31) that the proof was inadmissible under this Court's decision in *Krulewitch v. United States*, 336 U. S. 440. First (in order of logic), petitioners apparently assume (Br. 29-31) that the evidence in question could have been deemed admissible only on the theory which permits acts and declarations of one conspirator, occurring during the course and in furtherance of a conspiracy, to bind a co-conspirator and serve as evidence against him. Second, they urge (Br. 25-29) that the conspiracy ended with the entries into the United States and that the theory of admissibility which they assume to be the only possible one was therefore unavailable.

It bears mention at the outset that, if petitioners' arguments were correct, proof of facts such as those which were in issue in this case would be difficult to the point of impossibility, for the most obvious evidence that the parties did not intend when they entered to live together as husbands and wives is evidence that they promptly proceeded not to live together. Passing this practical consideration, however, the decisive point is that petitioners have erred in both branches of their argument.

A. *The evidence of which petitioners complain was admissible against all of them regardless of when the conspiracy ended*

As petitioners point out (Br. 26), the testimony they attack on the ground considered here "consisted largely of evidence to the effect that the

parties to each marriage lived apart from each other * * * ; that the husband in one marriage lived and slept with the wife (his former wife) in another marriage * * * , and took her to night clubs where they had pictures taken of themselves and others * * * .” This evidence, it is important to note, is evidence of *acts*, not of *admissions*. In their argument, petitioners refer (Br. 29) to a single admission by one conspirator which they assert was admitted against all, but this assertion is mistaken.¹⁸ It is clear, we think—from petitioners’ argument here and in the court below, and on consideration of the record, including particularly the nature of petitioners’ objections in the trial court, which we discuss more fully in the margin¹⁹—that the substantial issue presented

¹⁸ The admission in question is that of petitioner Munio Knoll, testified to by witness Haberman (R. 160), that it is “easy * * * to come to the United States if you know how.” Referring to a general statement of the trial judge on the preceding page (R. 159), during a colloquy with counsel while the jury was outside the courtroom, petitioners state that Munio Knoll’s statement was admitted against all of the petitioners. But the record shows the contrary. Shortly before, during witness Haberman’s testimony (R. 152), the trial judge had said the conversation to which the witness was about to testify was to be admissible only against Munio Knoll and Lutwak, who were present at it. While a similar ruling does not appear on the page to which petitioners refer, the trial judge expressly called the attention of the jury shortly afterward to the very conversation and statement in question and told them it was admissible only against Munio Knoll (R. 174), after reminding counsel a few minutes earlier that this ruling applied to all the conversations to which Haberman testified (R. 167). Later in the trial, the trial judge reminded the jury of this limitation on Haberman’s testimony (R. 288).

¹⁹ Petitioners made a blanket objection to evidence of facts—acts or declarations—following the entries into the United States, an objection which was renewed from time to time dur-

concerns acts, not admissions, which are claimed to have been improperly admitted against co-conspirators.

The evidence of acts, which petitioners claim was improperly admitted, was evidence showing that the respective "husbands" and "wives" in the purported marriages never lived together, never acted married, and (except in the case of Leopold Knoll, who was acquitted) carried out the plan to

ing the trial (R. 66; and see R. 67, 135, 142, 204). Though this objection was overruled as to evidence of acts, the trial judge repeatedly ruled that evidence of statements by one conspirator would be admitted only against that conspirator (e.g., R. 152, 167, 174, 175, 209, 278). In one instance, however, testimony that Munio Knoll had asked Bess Osborne to postpone her divorce action until he had become a citizen was admitted against all the petitioners (R. 208-209). But, although defendant Leopold Knoll (who was acquitted) objected in advance, as to himself, to evidence of this conversation, none of the present petitioners made any such objection. It seems clear, in any event, that in view of the great cumulation of uncontroverted evidence showing that Munio Knoll's marriage to Bess Osborne was designed solely to secure Munio's entry into the United States, this single bit of testimony that Munio asked Bess to delay her divorce until he became a citizen can scarcely be viewed as particularly hurtful, assuming for the present (but see pp. 42-47, *infra*) that it was erroneously admitted. We think the nature of this single bit of testimony, the absence of specific objection to it, and petitioners' argument here demonstrate that this alone could constitute no basis for reversal on any theory. But if we are wrong in this conclusion, the following alternatives should be outlined:

(1) If we are correct in arguing (pp. 42-47, *infra*) that the conspiracy was not ended, the piece of testimony in question was admissible on that ground.

(2) If the Court were to (a) accept the argument we are here introducing, making the evidence of acts admissible regardless of when the conspiracy terminated, (b) reject our later argument that the conspiracy continued, and (c) hold that admission of Munio Knoll's statement against the two other petitioners was reversible error, this would be no ground for reversal as to Munio Knoll, whose admission was concededly admissible against himself.

be divorced after entering the United States. This evidence was obviously relevant to prove that the marriages had been contracted only so that the aliens could enter as "spouses" under the War Brides Act and to prove that the purported spouses lied when they represented to the immigration authorities that they intended to live with the ex-serviceman and ex-servicewomen they had ostensibly married. Because this evidence was relevant, it was admissible regardless of when the conspiracy terminated. For there is no problem of hearsay here, as there was in *Krulewitch*, and the acts of one party may be admissible in evidence against another party when they are relevant on a material issue against the latter, without any showing that the parties are related as conspirators (or related in any other way) at all.

Where it is sought to introduce against Conspirator *B* evidence of *declarations* by Conspirator *A*, the obstacle is that, as to *B*, these declarations are hearsay, as this Court's *Krulewitch* decision makes clear.^{19a} In such a case, the theory of "criminal agency"²⁰ which makes co-conspirators responsible for the acts and declarations of each other is necessary to overcome the hearsay objection. And so when the declaration of Conspirator *A* is not made during the course of the conspiracy, the vice

^{19a} Of course, the declarations are, in the strict sense, hearsay as against *A* as well, but are admitted on the elementary ground that a party's own admissions may be adduced against him.

²⁰ See 2 Wharton, *Criminal Evidence* (11th ed.), pp. 1185-1186.

of hearsay is present and evidence of such a declaration is inadmissible against *B*.

Where the evidence in question relates to an *act* of Conspirator *A*, however, the problem is simply one of relevance, not of hearsay. The vital importance of this point here is that, if evidence of some act or condition or characteristic of *A* is *relevant* to prove guilt or any material fact against *B*—regardless of whether *A* is a co-conspirator or simply a third party unrelated by agency to *B*—there is no need to invoke the conspiracy theory of criminal agency in order to introduce such evidence against *B*. Identifying the distinction to which we refer, Professor Edmund Morgan has pointed out the necessity for differentiating—

between * * * declarations offered for their assertive value and * * * non-verbal acts and declarations offered as constitutive conduct for which the conspirator or principal is alleged to be responsible. In the latter situations, the question is one of relevancy only * * *. [Emphasis added.] ²¹

The present case presents such a situation, where the question is one of “relevancy only,” and the answer to this question makes it unnecessary to consider petitioners’ argument (clearly fallacious in our view, pp. 42-47, *infra*) that the conspiracy ended with the entries into the United States. For the evidence of which they complain was (with a

²¹ Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*; 43 Harv. L. Rev. 165, 183 (1929).

trivial exception, the unimportance of which is emphasized by petitioners' failure to rely upon it; see note 19; *supra*) evidence of the *acts* which was *relevant* to material issues as to the guilt of all the conspirators.²² It was alleged—and petitioners make no pretense of denying the materiality of the allegation—that the conspirators arranged “marriages in form only,” solely to accomplish “war bride” entries into the United States, not intending that the spouses should live or deal with each other as husband and wife, and intending that the formal marriage ties would be severed at the convenience of the parties (R. 6-7). To prove the character of these marriages, for which all of the conspirators were admittedly (at least for purposes of the present *Krulewitch* problem) responsible, it was obviously relevant to show that the respective purported “husbands” and “wives” never lived together, never acted married to each other, and took early steps to procure divorces. Indeed, whenever the existence of a marriage is in issue in a lawsuit, it is universally recognized that evidence of the conduct of those alleged to be married is relevant and admissible.²³ So, for example, where a material fact in a lawsuit damaging to Party A

²² Following the widespread, but not necessarily uniform, usage adopted in the American Law Institute's *Model Code of Evidence*, Rule 1(8) and (12), we use “relevant” here to describe “evidence having any tendency in reason to prove any material matter,” while “material” refers to “a matter the existence or non-existence of which is provable in the action.”

²³ 2 Wigmore, *Evidence* (3d ed.), § 268:

When the fact of marriage is in issue—whether a consensual or a ceremonial marriage—the subsequent *con-*

would be the fact that *B* and *C* were married (say, in a suit by *B* against *A* for loss of *C*'s services, where *A* denied that *B* and *C* were married), evidence that *B* and *C* lived together and behaved as husband and wife would be admissible against *A*. This, obviously, would not result from any notion that *B* and *C* were co-conspirators of *A*, but simply from the circumstance that the evidence of *B*'s and *C*'s acts was relevant on a material issue against *A*. Similarly, here, there is no need to hold that petitioners Lutwak and Treitler were responsible as "principals" for the conduct of Munio Knoll and Bess Osborne, ostensibly married, in living apart, vigorously acting unmarried, etc. What matters is that the nature of Knoll's marriage to Osborne and the truth of their representation to immigration officials that they planned to reside together after entering the United States were both material issues in the case against all the conspirators, and the evidence of their subsequent conduct was plainly relevant and admissible on these issues regardless of Knoll's and Osborne's roles as co-conspirators.

Squarely in point here is the decision of the Court of Appeals for the Second Circuit in *United States v. Rubenstein*, 151 F. 2d 915, certiorari denied, 326 U. S. 766. There, as here, the defendant was charged with conspiring "to bring into the country an alien by false representations [and]

*duct of the man and the woman said to have been the parties to it is receivable to evidence the marriage. * * **

* * * That this sort of evidence is admissible seems never to have been questioned.

by concealment of material facts." There, as here, the device used was a marriage ceremony between the alien and an American citizen in order to effect admission of the alien as the citizen's spouse. There, too, the marriage was never consummated, the parties lived apart, and a divorce was arranged at an early date after the entry. The defendant complained in that case that evidence of the divorce (which had, incidentally, been procured by fraud; cf. note 41 p. 73, *infra*) was inadmissible, because "it was an independent and disconnected crime, the conspiracy having ended when Spitz entered under the immigration visa." Rejecting this contention, Judge Learned Hand wrote (with the concurrence of Judges Augustus Hand and Frank on this point, 151 F. 2d at 917-918):

* * * [The defendant] is right in saying that the crime ended with the entry; but it by no means follows that evidence of the divorce was not relevant to the crime. Before she obtained the fraudulent visa Spitz [the alien "spouse"] had told Rubenstein [the defendant, a lawyer] that there was to be a divorce; Sandler [the citizen "spouse"] had said the same thing; and Rubenstein had assured him that there would be a divorce almost at once. If the spouses' intent at the time of the ceremony was probative of fraud upon the immigration officials (as we shall show that it was) [see pp. 53-54, 68-69, *infra*] it was relevant to prove that they were later divorced, because it went to confirm their testimony as to what they had originally intended and agreed upon. We are therefore all agreed that *the*

fact of the divorce was relevant; indeed this becomes at once apparent if we consider how damaging to the prosecution's case it would have been, if no divorce had followed. [Emphasis added.]

The applicability of Judge Hand's reasoning and conclusion to the instant case is plain.²⁴ It was material to the guilt of the petitioners that the marriages and statements to the immigration officials were accomplished with the fraudulent intent we have described. Because it was relevant, and not hearsay, evidence of this intent, proof of the non-marital conduct and living apart of the spouses was properly admitted.

The faulty premise underlying petitioners' contrary view is the idea that acts of *A* may be evidence against *B* only where *A* and *B* are co-con-

²⁴ One defendant in the instant case, Leopold Knoll, who was acquitted, gave eloquent testimony, through the conduct of his defense, to the commonsense judgment of obvious relevance which makes the evidence under attack admissible. At the trial, counsel for Leopold Knoll was at some pains to show that the marriage of this defendant was real, that it had been consummated, that Leopold had lived (beginning only on a date over two years after his entry into the United States) with the woman he married. Leopold's counsel went even further and elicited from Leopold's spouse an assurance that she intended to live with him as his wife in the future, after this trial (R. 260-261.) While there was additional evidence differentiating Leopold from the other defendants, it is clear that the evidence just cited was favorable to him and probably accounts in some measure for his acquittal. It is clear, moreover, that evidence of his spouse's acts subsequent to his entry into the United States was admissible in his favor simply because it was relevant, and not because of any theory that she performed these acts as his agent. As we show in the text, the same basis for admissibility applies to the similar unfavorable evidence of which the petitioners complain.

spirators and the conspiracy is in progress.²⁵ As we have shown, the fallacy here is the failure to recognize that, where *acts* are in question, the problem is solely one of relevance, and that it is only where the act of *A* would otherwise be irrelevant as to *B* that it is necessary to resort to the conspiracy (agency) theory to admit evidence of such an act against *B*.²⁶ Because the evidence petitioners attack was relevant against all of them, the attack must fail.

B. In any event, the conspiracy did not end with the entries into the United States; it was clearly "within the scope of the unlawful project" that the purported spouses would live apart and be divorced, so that evidence of these facts was properly admitted against all the conspirators

When a conspiracy begins or ends is, of course, a factual question in each particular case. Dealing cursorily with the facts of the present case (Br. 25-26), petitioners urge that their conspiracy ended with the last entry into the United States, on December 5, 1947, because by that time "all

²⁵ Compare Underhill, *Criminal Evidence* (4th ed.), p. 1414; "Acts and declarations done or made by conspirator before formation of conspiracy are not admissible against co-conspirator unless admissible in the absence of such conspiracy." [Emphasis added.] See *Feigenbutz v. United States*, 65 F. 2d 122, 124 (C. A. 8); cf. *Sneed v. United States*, 298 Fed. 911, 915-916 (C. A. 5), certiorari denied, 265 U. S. 590.

²⁶ Not only the acts, but the condition or appearance of *A* may constitute relevant, admissible evidence against *B* without any suggestion of agency or conspiracy. For example, the physical characteristics of a child may serve as evidence on the question of paternity—not, obviously, on an agency theory,

misrepresentations, concealments, and false statements, if any, in furtherance of such entries had occurred." But this contention, ignoring the nature of the ~~s~~cheme charged and proved, mistakenly assumes that the conspiracy necessarily ended with completion of the substantive offenses. It is clear, however, that—

the termination of the conspiracy * * * is not necessarily synchronous with the consummation of the substantive crime charged, but may extend beyond such time, resulting in the admissibility of acts and declarations of co-conspirators, in certain instances, after the commission of such crime. The determination of the question as to when a conspiracy terminates depends on the facts of the particular case. For example, a conspiracy to bring Chinese in from Mexico unlawfully does not necessarily and automatically end at the border, for in order to consummate successfully the unlawful introduction of prohibited aliens, it is also necessary to evade immigration officials, and hence such conspiracy continues for that purpose. [*Lew-Moy v. United States*, 237 Fed. 50 (C. A. 8).] * * * In homicide cases, where the crime is actuated by malice towards the deceased, a conspiracy to commit the homicide ends with the accomplishment of the crime. But where the homicide is incidental to an ulterior motive, as, for example, the collection of an insurance policy on the life of the deceased, statements made

but simply because these characteristics may be relevant to the issue. 1 Wigmore, *Evidence* (3d ed.) § 166. And see, on an analogous problem, *State v. Sprague*, 135 Me. 470, 475-476.

by a conspirator after the homicide, in pursuance of such objective, are admissible against a co-conspirator on trial.²⁷

The indictment in this case charged that petitioners conspired, not only to make misrepresentations to the immigration officials to accomplish illegal entries into the United States, but also (1) to conceal their fraud, and (2) to arrange that the purported spouses would live apart and obtain divorces (R. 4-7, 9-15).²⁸ Without repeating at length the summary of evidence (*supra*, pp. 7-19), the record establishes, as the indictment charged, that the separate living arrangements of the ostensible spouses and the severance of their formal marriage ties were integral and essential parts of the conspiracy. From the very beginning,

²⁷ 2 Wharton, *Criminal-Evidence* (11th ed.), pp. 1200-1202.

²⁸ Since the disputed evidence relates entirely to the facts that the spouses lived apart and arranged divorces, we shall concentrate on this aspect of the conspiracy in the discussion which follows. Referring, however, to petitioners' contention (Br. 28) that the record belies the charge of concealment, it bears mention that the evidence proved that, following the entries into the United States, in transactions at which all three petitioners were present, an apartment was rented for Maria Knoll as "Mrs. Lutwak," carrying out a pretense of marriage which it was later found expedient to abandon (*supra*, p. 9). When Maria and Munio Knoll were well enough acquainted with the Wickers (one of whom testified at the trial) to be their house guests, they felt free to share a room overnight, but when Wicker was still merely a prospective landlord and Treitler, Lutwak, and Knoll were arranging for an apartment, Maria was represented, not as Munio's wife or apartment-mate, but as "Mrs. Lutwak". In September, 1948, Munio Knoll, after a quarrel with his one-time friend and prospective business associate, Haberman, still sought to exact a promise that Haberman would not speak to anyone about the circumstances of the Knolls' entries into the United States (*supra*, p. 11).

when she set about finding ex-servicewomen to marry her brothers and bring them in as war brides, petitioner Treidler made it clear that the marriages would not have to be consummated and that early divorces were part of the plan (*supra*, pp. 7, 14). Also early in the arrangement of the scheme, Bess Osborne was persuaded to marry Munio Knoll rather than Leopold Knoll, as originally planned, so that Munio could be reunited with Maria, who had entered the United States as the war bride of petitioner Lutwak. The separations and divorces were thus no less essential to the successful conclusion of the conspiracy than the fraudulent representations by means of which the entries were accomplished. It was presumably as important to Bess Osborne, for example, that she be freed of even formal legal ties to Munio Knoll, who meant nothing to her, as it was that she be paid the \$1,000 which was actually paid to her as promised *after Munio Knoll's entry* into the United States as her spouse (*supra*, pp. 6-17). It was equally vital, as the conspirators had made clear from the beginning, that Munio and Maria be reunited after entering the United States—an objective at which they arrived even before Lutwak's divorce from Maria made the reunion wholly lawful or technically seemly (*supra*, pp. 9, 10, 11).

Where the spoils sought by the conspirators remain to be realized or to be divided, the conspiracy remains alive while the conspirators act to achieve these ends. See *McDonald v. United States*, 89 F. 2d 128, 134 (C. A. 8), certiorari

denied, 301 U. S. 697; 2 Wharton, *Criminal Evidence* (11th ed.), § 716. Similarly, here, after the entries into the United States had been made, there remained the projects of paying Bess Osborne for her services and severing the ostensible marriage ties which had served their purpose and remained only hindrances to the ultimate objective. Pressing for her freedom from the formal marriage tie (*supra*, pp. 16-17), Bess Osborne made clear beyond doubt what the whole tenor of the scheme required—that the divorces be obtained. To argue that the conspiracy ended before these essential steps were completed is to ignore the simple factual realities which the evidence established beyond possibility of doubt.

We think it clear, in short, that the separations and divorces were “part of the ramifications of the plan which could * * * be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.” *Pinkerton v. United States*, 328 U. S. 640, 648. See also *United States v. McGuire*, 64 F. 2d 485, 493 (C. A. 2), certiorari denied, 290 U. S. 645. Here, as in the *Pinkerton* case, the subsequent acts done were “in execution of the enterprise.” 328 U. S. at 647. This is amply demonstrated by the overwhelming probability that the Government would have failed to prove the unlawful enterprise at all had there been a showing that the spouses actually lived together and acted married after entering the United States. Indeed, the one defendant who made some showing of this sort—implicitly testifying by the effort to

its essentiality—was acquitted. Cf. *United States v. Rubenstein, supra*, at 917-918.²⁹

It follows, we submit, that petitioners' reliance upon the rule in *Krulewitch v. United States*, 336 U. S. 440, is misplaced. In the first place, *Krulewitch*, as petitioners point out (Br. 27-28), involved a hearsay problem which is in no substantial sense presented here, so that a determination as to when the conspiracy ended would appear in this case (as in *United States v. Rubenstein, supra*) to be unnecessary (*supra*, pp. 33-42). But if such a determination is required, we submit that the separations of the spouses and their divorces (the facts petitioners claim should not have been shown) were integral parts of the conspiratorial scheme and were properly proved against all the conspirators.

²⁹ It must be noted that the Second Circuit's *Rubenstein* decision, upon which we have relied in other connections (*supra*, pp. 39-41; *infra*, pp. 53-4, 68-9), appears to be contrary to the argument we press here. There, on facts unquestionably similar to those involved here, the court agreed that the conspiracy ended with the entry, but concluded that evidence of subsequent facts was nevertheless admissible on grounds we have shown to be equally applicable in this case. The problem is, of course, tied in each instance to the facts of the particular case. Without exploring at length the details of the *Rubenstein* case, which might have warranted another view as to when the conspiracy ended (a view which the court was not, after all, required to accept or reject finally since the evidence complained of was approved on another ground), we submit that the present record, as shown in the text, fully sustains the holding that the conspiracy cannot be regarded as having ended with the entries into the United States.

**Upon a Finding That the Alleged Marriages Were
“Mockeries”—A Finding Fully Sustained by the Record
—The Trial Court Properly Rejected the Claim of
Privilege against a Spouse’s Unfavorable Testimony**

In the most abstract and universal of terms (Br. 31-41) petitioners argue in defense of “the rule that in federal criminal cases one spouse cannot testify against the other unless the defendant spouse waives the privilege” (Br. 31).³⁰ Incongruously, on the facts of this case, they invoke “the special protection society affords to the marriage relationship,” “the close emotional ties between husband and wife” (Br. 38), and the fact that in modern times “the husband and wife have grown closer together as an emotional, social, and cultural unit” (Br. 41). We think that there is no need for this Court in this case to decide the broad, abstract, general question mooted in petitioners’ brief. In our view, the privilege of a party to prevent his *spouse’s* testimony against him—accepting the privilege at its traditional value and ignoring the powerful arguments against its continued existence—was in no meaningful sense offended in this case. We believe this conclusion is compelled when the problem is defined precisely in the context of the circumstances from which it arises.

It is important to note at the outset that the

³⁰ As petitioners acknowledge (Br. 33), the privilege in issue here “is to be distinguished from the privilege against the disclosure of confidential communications between husband and wife.”

marital privilege petitioners invoke requires consideration only with respect to the testimony of Bess Osborne, the purported wife of petitioner Munio Knoll, and possibly with respect to Grace Klemtner, alleged wife of the acquitted defendant, Leopold Knoll. In a passage which goes far to demonstrate how removed this case is from any semblance of the supposed realities which give rise to the privilege in the first place, petitioners suggest (Br. 15-16) that "insofar as this problem relates to the competency of Maria [Knoll or Lutwak] as a witness, the marital status of Maria and Munio is involved." This ignores the fact that, though Maria and Munio had been married, Munio expressly disclaimed any objection to her testimony at the trial (R. 50-52). It ignores the rule, elsewhere acknowledged by petitioners (Br. 32, 35) that the privilege is personal to the spouse against whom the testimony is offered. See *Griffin v. United States*, 336 U. S. 704, 714; 8 Wigmore, *Evidence* (3d ed.) § 2242. More importantly, petitioners overlook that, if they were to make any semblance of a defense to the charges against them, the disclaimer by Munio was essential, for on their theory (1) Maria was, when she entered the United States, the war bride of Lutwak, not Munio's wife, and (2) Munio was the war bridegroom of Bess Osborne, hardly in a position to claim the privilege against Maria's testimony. As for Lutwak, he had divorced Maria before the trial (R. 92, Govt. Ex. 19), and petitioners do not and could not claim the privilege on his behalf

(See R. 43; *United States v. Walker*, 176 F. 2d 564, 568 (C. A. 2), certiorari denied, 338 U. S. 891; *Yoder v. United States*, 80 F. 2d 665 (C. A. 10); 8 Wigmore, *Evidence* (3d ed.) § 2237(2), pp. 249-250).

Passing Maria, then, the next of the three alleged spouses in question is Bess Osborne. The problem, as we view it, may be resolved by focusing on the state of the record when this witness was called to testify. For if at this point the trial court was correct in concluding that there was no basis in fact for the privilege because the marriages were "mockeries," he could certainly have been no less correct at the much later point when Grace Klemtner was called, after the sham character of the marriages the scheme intended had been more conclusively demonstrated. So, even apart from the fact that Leopold Knoll's acquittal may render academic the question of privilege against the testimony of his alleged spouse Grace Klemtner, it seems appropriate to discuss the present point in terms of the facts bearing on Bess Osborne. It may be noted, however, that the argument which follows, while its particular factual details refer to the case of Osborne, applies equally, *mutatis mutandis*, to the testimony of Grace Klemtner insofar as that testimony may be in issue.³¹

³¹ It makes no difference in this respect that the jury acquitted Leopold Knoll, very possibly in the belief that his marriage to Grace Klemtner was genuine. As petitioners insisted at the trial (R. 225), the question of competency was for the judge, not the jury. As we show more fully under Point III, pp. 57-66, *infra*, the propriety of the judge's determination on this score is in no way altered by the fact that the jury, bound

In their argument (Br. 38-41), petitioners outline and rely upon the bases in social policy which are thought to justify the privilege of a party against his spouse's unfavorable testimony. In a word, as petitioners' brief makes clear, the policies involved may be summarized as (1) that of preserving marital harmony against the suspicion and acrimony which might be engendered by testimony of one spouse against another, and (2) the almost inseparable belief that basic notions of fairness revolt against permitting a wife and husband, tied by emotional bonds of the most profound intimacy, to be the means of each other's betrayal. See 8 Wigmore, *Evidence* (3d ed.) § 2228. The evidence in this case, before the claim of privilege was asserted, amply demonstrated that no such considerations were present here. For the testimony had already shown that there was no "marriage" involved in any sense which could make the asserted privilege relevant. Upon powerful evidence that the "marriage" in question had consisted of nothing but a ceremony and a single representation for ulterior purposes that Knoll and Osborne were husband and wife—with no cohabitation, no consummation, no emotional ties of any kind, and no remote intention that any such ties should ever be established—the trial judge properly concluded that the marriage was a "mockery" and afforded no basis for the privilege.

by the greater requirements of proof for conviction, may have resolved the underlying factual issue, as it bore on the merits rather than on competency, the opposite way.

Before Osborne was called as a witness, there had been a cumulation of testimony proving the nature of the scheme and the character of the relationship between Knoll and Osborne upon which petitioners rely. The evidence had shown how petitioner Treitler had sought out an ex-servicewoman in this country to go to Paris, go through a marriage ceremony with her brother Munio Knoll, present him to the immigration officials as her spouse, receive a fee, obtain a divorce, and have done with the transaction. There was testimony (clearly admissible against Knoll on any theory) that Knoll had boasted how money, the "right connections," and know-how made an alien's entry into the United States easy (*supra*, p. 10). There was evidence that Munio had, after his entry, represented Maria, not Bess Osborne, as his wife, and that Maria was known to Knoll's friends as "Mrs. Knoll" (*supra*, pp. 10, 11). In his own statement, admitted only against him (R. 185), Knoll stated that he had never had sexual relations with Bess Osborne and had separated from her promptly upon their arrival in the United States (*supra*, p. 13).

In this state of the record, we think the trial judge's decision to admit the testimony of Bess Osborne as a witness was clearly correct.³² By way of a "marriage" upon which to base his claim of privilege, Munio Knoll could offer only a formal ceremony and a certificate, a pair of empty forms,

³² That the ruling on competency was made by the judge, and not left for the jury, see note 35, p. 58, *infra*.

a paper facade erected only to deceive the immigration authorities. Against the showing was a powerful array of evidence that the harmony which the privilege was designed to protect had clearly never existed and was never intended to exist. The purported marriage upon which the claim of privilege was predicated was, in every sense which bears in any significant way on the availability of the privilege, no marriage at all.

Speaking of a substantially identical "marriage," similarly arranged for the sole purpose of effecting an alien's immigration and similarly intended to end with the accomplishment of that purpose, Judge Learned Hand wrote for the Second Circuit (*United States v. Rubenstein*, 151 F. 2d 915, 918-919, certiorari denied, 326 U. S. 766):

[The purported spouses] were never married at all. Mutual consent is necessary to every contract; and no matter what forms or ceremonies the parties may go through indicating the contrary, they do not contract if they do not in fact assent, which may always be proved.

* * * Marriage is no exception to this rule: a marriage in jest is not a marriage at all. This is the law of New Jersey as well as elsewhere. *McClurg v. Terry*, 21 N. J. Eq. 225; *Girvan v. Griffin*, 91 N. J. Eq. 141, 108 A. 182 (semble). It is quite true that a marriage without subsequent consummation will be valid; but if the spouses agree to a marriage only for the sake of representing it as such to the outside world and with the understanding that they will put an end to it as soon as it has

served its purpose to deceive, they have never really agreed to be married at all. They must assent to enter into the relation as it is ordinarily understood, and it is not ordinarily understood as merely a pretence, or cover, to deceive others. [Emphasis added.]

This conclusion is squarely applicable here. It does not matter that in some abstract way the marriage may not have been "void" for all conceivable purposes. It is irrelevant to speculate whether the notions Bess Osborne and Munio Knoll made in a Parisian ceremony may have resulted in a "marriage" which could in some sense be deemed "valid." (cf. pp. 66-74, *infra*.) All that matters is that, in every sense which is conceivably relevant to the privilege Knoll asserts, there was no marriage here. The privilege claimed derives from American law; it is invoked in an American court; it rests upon notions of policy which have their only possible significance with reference to the marital "relation as it is ordinarily understood" in the law and morals of this country (and probably of France as well, though petitioners complain, mistakenly we think, that this was not proved in their trial; see pp. 66-74, *infra*). The facts to which the policies in question apply and for which the privilege is designed are absent in this case. There was no ground in these facts, in reason, or in precedent for Knoll's invocation of the privilege.

It has never been the law that having once gone through a marriage ceremony with a witness who is

called to testify against him, a party is always and necessarily able to preclude that witness' testimony. It is settled, for example, that divorce ends the privilege, for, where there has been a divorce, "there is no home life the peace and serenity of which may be destroyed." *United States v. Gonella*, 103 F. 2d 123, 124 (C. A. 3). Similarly, though the hoary reason which has been formulated to explain it is different, the exception to the privilege for cases where one spouse is charged with a personal wrong against the other (*e.g.*, *Hayes v. United States*, 168 F. 2d 996 (C. A. 10)) makes sense mainly as a recognition that the harmony and peace the privilege cherishes are best attenuated in the case of "the wife who has been beaten, poisoned, or deserted * * *." 8 *Wigmore, Evidence* (3d ed.), § 2239, pp. 251-252; see Clark, J., dissenting in *United States v. Walker*, 176 F. 2d 564, 569 (C. A. 2), certiorari denied, 338 U. S. 891. But the divorce cases alone are sufficient authority to defeat petitioners' argument. If divorce ends the privilege in the case where a "home life" and marital "peace and serenity," which once presumably existed, have ended, what basis is there for recognizing the privilege where these normal incidents of "marriage" have never existed and were never intended, and where even the formal certificate of marriage is to be nullified at the parties' earliest convenience after it has served its deceptive purpose?

Surely, the common law, "interpreted * * * in the light of reason and experience" (Rule 26, F. R.

Crim. P.) requires no such bizarre result. Indeed, petitioners, despite their eloquent defense of the privilege as a general proposition—implicitly invoking the normal facts of marriage as ordinarily understood, to which the policies of the privilege apply—point to no authority for the extension of the privilege they seek.³³ We submit that, whatever the future of the privilege in the federal courts may be, the courts below were clearly correct in denying its application here.³⁴

³³ There are state cases, which of course are not controlling on this Court, holding that a marriage which may have been contracted for the purpose of precluding the spouse's testimony constitutes a basis for invoking the privilege. *E.g.*, *State v. Chrismore*, 223 Ia 957; *Moore v. State*, 45 Tex. Cr. 234; *Cole v. State*, 92 Tex. Cr. 368. It does not appear in these cases, as it does here, that the parties never intended to live together and that the marriage was intended to be dissolved as soon as it had served its ulterior purpose. Indeed, it has been indicated, even by a court following this view, that the result might be different where it was shown that the parties to the marriage had no intention of assuming normal marital relations, and went through a marriage ceremony solely as "a fraudulent scheme . . . to thwart the administration of justice." *State v. Frey*, 76 Minn. 526, 530. Moreover, the rule appears to stem largely from cases where the defendant is charged with a crime against his wife before marriage (for example, rape or seduction) so that the marriage in such cases operates as a condonation. *E.g.*, *State v. Frey*; *supra*; *Doss v. State*, 156 Miss. 522; *Kaul v. State*, 43 Okla. Cr. 56. Obviously, in cases where the wife has married the defendant subsequent to the alleged crime against herself, there is some reason to assume a basis for the harmony and intimacy which give rise to the privilege.

³⁴ While the decision below rests (R. 413), as an alternative ground, upon the argument we urge here, the court devoted a considerably larger portion of its opinion to the view that the privilege petitioners assert is, "in the light of reason and experience," ripe for discard as far as the federal courts are concerned. We believe that this view, which has been pressed with persuasive vigor since at least the time of Jeremy Bentham's strictures, would merit favorable consideration were the problem reached here, for the reasons outlined by the court.

III

Where the Trial Judge Has Properly Rejected a Claim That a Witness Is a Party's Spouse and Permits Her to Testify against Him, the Witness May Testify as to Any Material Facts, Including Facts Showing That She Is Not the Party's Spouse

Relying upon the decision in *Miles v. United States*, 103 U. S. 304, petitioners argue. (Br. 41-43) that a witness, once alleged to be a party's spouse, may never, even after the allegation has been rejected and the witness has been admitted to testify, give evidence disproving the existence or the genuineness of the alleged marriage. This argument presupposes that the trial judge's ruling against the claim of privilege is correct, for the question is not reached otherwise. Petitioners do not question, but on the contrary have insisted throughout (see, *e.g.*, R. 225; *cf.* Pet. Br. 42-43), that the factual issues to be determined in resolving a claim that a witness is a party's spouse and cannot testify against him are for the court, not the jury. See 2 Wigmore, *Evidence* (3d ed.) § 487; 9 *id.* § 2550; *Gila Valley Ry. Co. v. Hall*, 232 U. S. 94, 103. What they argue is that, where a factual issue so determined by the judge in permitting the witness to testify is also a material issue in the lawsuit,

below (R. 406-413). The facts of this case, however, so clearly precluded the claim of privilege on grounds wholly consonant with the old common-law rule as to render unnecessary resolution of the broader question decided by the court below. But we would urge further that, if the privilege at common law could be deemed to extend to a case such as this, the privilege should at least to that extent be narrowed in the federal courts.

the witness may not thereafter testify as to that issue.³⁵

The rule for which petitioners contend is without justification in reason, and petitioners attempt no such justification. We think the precedent petitioners invoke, *Miles v. United States, supra*, is probably distinguishable on its facts. We submit further, however, that if the decision in *Miles* requires the result for which petitioners contend, that decision should not be followed here. For, in the event *Miles* necessarily means what petitioners say it means, we respectfully urge that so anomalous a result on the narrow issue in question, long

³⁵ Petitioners suggested at the trial (R. 225), and the suggestion appears to be renewed in their brief here (pp. 42-43), that the judge was passing on to the jury his own function of determining whether the marriages were genuine in order to decide whether the testimony of the alleged spouses could be received. But it is clear from the record that the trial judge made the determination³ as to competency himself and that, when he agreed (R. 188) that he was leaving it to the jury to decide the question whether the marriages were valid, he referred to this question as it bore on the merits of the case. As to his own finding on the question for purposes of ruling whether the alleged spouses could testify, he plainly indicated, when Bess Osborne was called, his conclusion that the marriage was a "mockery" and could not sustain the claim of privilege (R. 189). Later, when Grace Klemtner was called, he repeated this conclusion even more firmly, again referring to the jury's task of passing on this factual issue on the merits (R. 225). Finally, if it could be doubted that he determined the competency issue himself and did not leave it to the jury, it seems decisive that the trial judge never instructed the jury to make any such determination—or even that such a determination was necessary.

We think it unnecessary, however, to explore in detail the trial court's mental processes with respect to this problem. For it is plain, in any event, that the effect of the trial court's action was to make the ruling on the claim of privilege which was his to make. As to the correctness of the ruling, see pp. 48-56, *supra*.

obscured (at least in the federal courts) by the absence of need for reexamination, does not merit a revived and expanded tenure in the law.

A. *The asserted rule, that a witness found competent by the court may not testify on material factual issues which happen to coincide with issues affecting the witness' competency, has no basis in reason.*

Where a contested factual issue bearing on competency is also a material issue in the lawsuit, judge and jury have sharply distinguishable functions. The judge must determine the issue before the jury may hear the witness at all. If the witness is found to be competent and then testifies on this same factual issue, the jury is concerned, not with competency, but with the weight of the evidence, along with other evidence, as it bears on the issue in question. If the witness serves to persuade the jury to the same view the judge took on the factual issue, the witness is in a sense persuading the jury of his competency. But this consequence is the most academic of abstractions, for the jury is not determining competency.³⁶ And the problem is no different because the jury may resolve the issue contrary to the judge's finding. As the Reporter for the American Law Institute's

³⁶ To be distinguished from this ordinary situation is the exceptional case, such as one where a confession is involved, in which the jury in effect reconsiders the judge's ruling that evidence is admissible. As petitioners have insisted throughout (See, R. 225), the question of admissibility in this case was solely for the court.

Model Code of Evidence has written (Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 Harv. L. Rev. 165, 188 (1929)):

* * * There is * * * no requirement at all that judge and jury shall agree on ultimate facts. Consistency or inconsistency between a preliminary finding by the judge and a final determination by the jury would therefore be entirely immaterial, even if the two findings were made for the same purpose. The judge, however, is ruling for the purpose only of determining whether the jury shall hear the evidence, and the rules which govern him in reaching his conclusion may be quite different from those governing the jury in its deliberation. For example, a person of normal intelligence is *prima facie* competent as a witness. He who objects has the burden of persuading the judge of the specific incompetence which he alleges. Hence, if the mind of the judge is in equilibrium on the question, he must decide in favor of competency. Thus he may let in the alleged interested survivor's testimony because he cannot make up his mind whether the witness falls within the prohibition. The jury, however, will have to find by a preponderance of the evidence that the contract was made, in order to find for the plaintiff. And if plaintiff's only evidence is that the contract was made through X, then assuming the court and jury to be in absolute accord on the facts, their findings would have to be different.

Coming to the particular problem of this case, where an alleged wife has been found by the judge not to be a wife and she is therefore permitted to testify against a defendant claiming to be her husband, her testimony may range through the most damaging of conceivable facts. She may testify that she saw him kill the victim, spend the stolen money, forge the bogus check. Her testimony on all such potentially fatal issues is neither excluded nor discredited because of the rejected assertion that she is the defendant's wife. It is impossible to perceive why she should be any less competent to testify to a fact so peculiarly likely to be within her knowledge—the fact that she is not the defendant's wife.

We think the answer to petitioners' argument in this case is the answer the Supreme Court of Georgia gave in *Hoxie v. State*, 114 Ga. 19, 21, where the court said:

If the woman was the wife of the accused, she was, of course, incompetent to testify; but if not, she could testify as any other witness. She, of all others, knew what the truth of this matter was, and there is no reason, either in law or logic, why she should not have been allowed to state under oath whether or not she had ever been married to the accused.³⁷

³⁷ It is not altogether clear in *Hoxie v. State* whether the trial judge ruled as to competency before permitting the witness in question to testify. But this problem, absent from the instant case (see note 35, p. 58, *supra*; cf. pp. 63-64, *infra*), scarcely lessens the relevance of the decision here. If anything, it makes the decision a more extreme rejection of petitioners' argument than is required.

B. *The decision in Miles v. United States is distinguishable; it should not in any event lead to the anomalous result petitioners seek*

Miles v. United States was a prosecution for bigamy. There was evidence tending to show that the defendant, a Mormon, had married three women on a single day and that it had subsequently been determined to denominate these wives "first," "second," and "third" in order of age. An applicable statute of the Territory of Utah forbade testimony by spouses for or against each other.

There was no dispute as to the marriage with the "second" wife, the only issue on the trial, contested throughout, being the fact of the previous marriage. Called as a witness for the prosecution, over defendant's objection, the second wife gave testimony tending to prove the first marriage. Reversing the judgment of conviction, the Court said (at p. 313):

As [the alleged second wife's] competency depends on proof of the first marriage, and that is the issue upon which the case turns, that issue must be established by other witnesses before the second wife is competent for any purpose. Even then she is not competent to prove the first marriage, for she cannot be admitted to prove a fact to the jury which must be established before she can testify at all.

On its face the quoted language undeniably supports the position petitioners press here. There are factual distinctions between the cases, however,

which argue against extension of that language to the present situation.

1. Statements in the *Miles* opinion strongly indicate that the Court was not convinced of the adequacy of the trial judge's preliminary ruling on competency. At the outset of the passage from which we have quoted (at p. 313), the Court said:

The testimony of the second wife to prove the only controverted issue in the case, namely, the first marriage, cannot be given to the jury on the pretext that ~~its~~ purpose is to establish her competency.

In the next sentence, the opinion pointed out that the issue as to the first marriage "must be established *by other witnesses* before the second wife is competent for any purpose." (Emphasis added.) Later in the opinion the Court said (at p. 315):

In this case the injunction of the law of Utah, that the wife should not be a witness for or against her husband, was practically ignored by the court.

And finally, the Court said that (*ibid.*)

the evidence of a witness, *prima facie* incompetent, and whose competency could only be shown by proof of a fact which was the one contested issue in the case, was allowed to go to the jury to prove that issue *and at the same time to establish the competency of the witness*. [Emphasis added.]

These passages indicate, we think, that the Court was not persuaded that the trial judge had performed his duty to determine, in advance of the questioned witness' testimony and from other witnesses, the competency of the witness to testify at all. The evidence had shown that the type of Mormon marriage ceremony in question was highly secret and that the persons officiating at such ceremonies were sworn to conceal the facts. 103 U. S. at 315. The Court observed that these facts and the rule against spouses' testimony made proof of bigamy practically impossible in Utah. *Ibid.* In the circumstances, the Court was apparently of the view that the trial judge, having "practically ignored" the prohibition against a spouse's testimony, had permitted the witness to testify, not only to prove the contested fact to the jury, but "at the same time to establish the competency of the witness." P. 315.

As we have shown, there is no comparable problem in the present case. Here, on ample evidence wholly apart from and preceding the testimony petitioners complain of, the court had found that there were no genuine marriages and that the witnesses were therefore competent.

2. Under the statute involved in *Miles*, a wife could not testify either for or against her husband. It followed that an alleged second wife of a defendant prosecuted for bigamy, as the Court's opinion shows (pp. 313-315), could not logically give favorable evidence regarding the alleged first mar-

riage—i. e., evidence to disprove the existence of the first marriage and, therefore, the absence of bigamy—for such testimony would argue against her competency to testify at all. Relying on authorities which made this problem clear, the Court simply extended the rule, as Greenleaf did in the passage the Court quoted (pp. 314-315) to exclude testimony either way on a contested issue as to a first marriage.

Insofar as the problem of incompetency to give favorable testimony may explain the result in *Miles*, there is, of course, no longer any reason for a similar result. *Funk v. United States*, 290 U. S. 271.

Whatever significance the Court may attach to the factual distinctions between *Miles* and the instant case, the result for which petitioners contend under *Miles* should in no event be applied to the situation presented here. On the limited issue under consideration, the rule in the *Miles* case has had an inconspicuous history. Our research discloses no comparable results in later federal cases.³⁸

³⁸ Petitioners cite *Matz v. United States*, 158 F. 2d 190 (C. A. D. C.), as a recent decision in which the *Miles* case was "acknowledged to be the law * * * (Br. 41). But *Miles* was invoked in that case for two wholly dissimilar and far less esoteric propositions than the one which concerns us here: (1) "That * * * a marriage might be proven like any other fact, by the admissions of the defendant, or by circumstantial evidence." Pp. 191-192. (2), That, where an alleged wife in a second, bigamous marriage was called as a witness, it was for the trial judge to determine her competency by deciding "whether the first marriage was established by the proof offered to his satisfaction." P. 192.

If anything, the *Matz* case departs from the rule of *Miles* for which petitioners cite it. For in *Matz*, the alleged second

We believe, for reasons already stated (pp. 59-61, *supra*), that if there ever was a reason for the rule petitioners would apply to this case, the reason has long since disappeared. Accordingly, if the *Miles* decision must be read to require such a result, we respectfully submit that it should to this extent be limited to its peculiar facts.

IV

The Government Was Not Required to Prove That the Marriages Were "Invalid" Under French Law

The indictment charged (R. 4-7, 10, 11), as the jury was instructed (R. 333-335), that the defendants had conspired (1) to arrange the marriages solely for the purpose of misrepresenting the three couples to the immigration authorities as husbands and wives in order to effect the entries of the alien "spouses" as nonquota immigrants under the War Brides Act, and (2) to conceal from the immigration authorities this scheme and the fact that the parties to the purported marriages intended never to live together as husband and wife. Misconceiving the nature of this charge and of the fraud the evidence showed they conspired to commit, petitioners argue (Br. 44 *et seq.*) that the "government had the burden of establishing the invalidity of the Parisian marriages." Summarized briefly at the outset, we think the refutation to this argu-

wife, having been found competent by the trial court, was permitted to testify that she had met the alleged first wife and had thought she was the appellant's sister—facts obviously touching on the issue as to the first marriage, the issue which in turn determined the witness' competency.

ment may be stated as follows: (1) The aliens in question were not "spouses" within the meaning of the War Brides Act; (2) invoking that Act, petitioners conspired to misrepresent the aliens as "spouses" within the Act and to misrepresent that the parties to the purported marriages intended to live together, demonstrating their awareness of the fraud and of the means by which it could be expected to succeed; (3) whatever "validity" the forms might have had for some conceivable purpose—under French or American or any other law—it was an integral part of the scheme that the forms themselves would be nullified for all purposes when they had served the single purpose of the parties of getting the aliens past the immigration officials. For these reasons, inquiry into French law, the bare forms of which petitioners employed only to practice fraud under American law, was wholly unnecessary.

1. It requires little discussion to show that, when Congress in the War Brides Act relaxed the restrictions of the immigration laws to admit "spouses" of World War II veterans, it did not intend the Act to benefit the type of "spouse" this case involves. Empty ceremonies and formal certificates of "marriage," designed only to bestow the title of "spouse" for long enough to take advantage of the Act, were clearly not the objectives Congress sought.

Written two years before the entries of the aliens in this case, the opinion of Judge Learned Hand in *United States v. Rubenstein*, 151 F. 2d 915 (C.A.

2), certiorari denied, 326 U. S. 766, is apposite here. In that case, as in this, there was a charge of conspiracy to obtain entry into the United States by false representations of material facts. There, too, seeking the benefits of a statute permitting the "spouse" of a citizen to enter the United States, the parties had arranged a "marriage" solely for that purpose—intending merely to represent themselves as married and to obtain a divorce when the benefit of the immigration statute had been realized. Rejecting the contention that there had been no unlawful conduct because the marriage was "valid," Judge Hand wrote (151 F. 2d at 918-919):

*** The statute condemns not only a false representation, but a "willful concealment of a material fact." § 180a, 8 U. S. C. A. [The appellant] knew that the parties proposed a divorce within six months, and that was a fact most material to the granting of the visa. The statute is not concerned with marriage, merely as marriage; one, perhaps the chief, reason why it allows the wife of a citizen to enter is because the husband will be responsible for her support. If the spouses at the time of the wife's entry intend that that responsibility shall end as soon as possible, they have evaded the statute by suppressing a material fact; and the suppression is a fraud, even though the marriage is valid. But, that aside, [the purported spouses] were never married at all. *** It is quite true that a marriage without subsequent consummation will be

valid; but if the spouses agree to a marriage only for the sake of representing it as such to the outside world and with the understanding that they will put an end to it as soon as it has served its purpose to deceive, they have never really agreed to be married at all.³⁹

The problem of support after the alien's entry may be less significant under the War Brides Act than it was under the immigration statute considered in *Rubenstein*, but it is equally true in both cases that Congress meant by "spouse" something considerably more than a person who has gone through a marriage ceremony in order to get into the United States and intends with utmost dispatch thereafter to wipe out the formal vestiges of the ceremony by a divorce. Confirming what would be obvious in any event, the House and Senate reports on the bill which became the War Brides Act made explicit, in identical language, that Congress was moved to the legislation by the "strong equities [which] run in favor of * * * service men and women *in the right of having their families with them* * * *." H. Rep. 1320, 79th Cong., 1st Sess., p. 2; S. Rep. 860, 79th Cong., 1st Sess., p. 2 (emphasis added). "This was a bounty afforded by Congress not to the alien who had become the wife of an American but to the citizen who had honorably served his country." *Knauff*

³⁹ While the marriage ceremony in the *Rubenstein* case had been performed in the United States, we show below (pp. 71-74) that this fact does not lessen the precise applicability of the court's reasoning to the facts presented here.

v. *Shaughnessy*, 338 U. S. 537, 548 (dissenting opinion of Mr. Justice Frankfurter). Concerned with "the deepest tie that an American soldier could form," the "Act is legislation derived from the dominant regard which American society places upon the family." *Id.*, at 548, 549. Surely nothing was farther from the statutory purpose than providing a means whereby soldiers could earn travel expenses and a fee for bringing unloved, unwanted, practically unknown "spouses" *pro hac vice* past the immigration barriers. The short of the matter is that "spouses" like the ones in this case, whatever they may have been under French law, were without a doubt not "spouses" within the meaning of the War Brides Act.

2. When they arrived at the borders of the United States, the alien "spouses" in this case expressly claimed the right to admission under the War Brides Act, each completing a form under oath headed "Application for admission to the United States as a nonquota immigrant under the Act of December 28, 1945" (Govt. Exs. 1, 2, and 3). Maria Knoll (Lutwak) and Munio Knoll, claiming to be married to petitioner Lutwak and Bess Osborne, respectively, stated on the application that they were going to live with these alleged spouses. ⁴⁰

⁴⁰ Interesting among the facts which presumably distinguished Leopold Knoll, the acquitted defendant, in the minds of the jury is his failure to answer the "person-to-whom-destined" question fully on the form. He merely wrote in this space the address of his sister, Regina Treitler, giving no name (Govt. Ex. 3).

Thus, the aliens represented themselves to be spouses within the American statute, not only willfully concealing (as the jury found on overwhelming evidence) the facts which would have belied this representation (*United States v. Rubenstein, supra*), but affirmatively misrepresenting a fact the revelation of which might well have frustrated the objective of the conspiracy. Knowing they had represented for themselves a status which to the whole western world implies cohabitation, they falsely stated an intention to cohabit. Knowing they were claiming the benefit of an American law plainly designed to enable American soldiers to bring their alien families to live with them, they falsely represented that they had arrived to live with their soldier spouses.

3. Now petitioners argue that the marriages in question may in some sense have been "valid" under French law and that the Government's failure to prove the contrary somehow precluded the finding that they were guilty as charged. They do not question the sufficiency of the proof that, whatever the French law they invoke might conceivably be, they merely went through the forms, intending only the single effect that they would have a paper basis for representing themselves as "married." In other words, whatever consequences might supposedly follow from finding that the marriages were in some sense "valid" under French law, they were consequences which, the proof showed, petitioners neither desired nor intended, but planned to avoid utterly by arranging divorces promptly

after their scheme for entry into the United States had succeeded. In the circumstances, the fact that petitioners arranged the ceremonial motions in France makes no difference. What matters here, as it mattered in the Second Circuit's *Rubenstein* decision (where the marriage ceremony took place in the United States), is that the ceremony was an empty form—designed to deceive, employed to deceive, and thereafter to be discarded. Cf. *United States Bank v. Owens*, 2 Pet. 527, 536 (“a fraud upon a statute, is a violation of the statute”); *Austin v. Tennessee*, 179 U. S. 343, 359-361; *Gregory v. Helvering*, 293 U. S. 465, 469-470.

The fallacy of petitioner's thesis is illuminated to a considerable extent by a portion of their own argument. Turning from the contention that the Government's failure to prove “invalidity” of the marriages under French law vitiated the case against them, petitioners argue (Br. 47-48) that the marriages were in any event “valid” under American law. They write (Br. 47):

The evidence, taken at its strongest for the government, indicated that the parties to the various marriages entered into them freely with a view to accomplishing the entry into the United States of the alien spouse in each marriage. Thereafter, they were to be terminated. Under the law of Illinois and most other states such marriages are not invalid. *The majority rule is that where a man and woman have gone through a marriage ceremony for the purpose of accomplishing a definite object, but pursuant to an understanding*

that after the marriage has been performed each party would go his own way and one of them would later seek a divorce or an annulment, such a marriage is valid; and most courts have refused to give effect to the intent of the parties that the marriage should be merely a matter of form. [Citing cases; emphasis added.]

The pitfall, obviously, is the large word "valid." What petitioners have shown is that a court of equity, asked to bring a fraudulent scheme to a happy conclusion, will refuse. Thus, in the first of the cases petitioners cite at the end of the foregoing passage (*De Vries v. De Vries*, 195 Ill. App. 4, where the parties married only so that the woman could escape from a theatrical contract, agreeing to obtain an annulment thereafter), the lower court dismissed the bill "for want of equity on the ground that such an arrangement was against public policy." 195 Ill. App. at 5. Affirming this decision, the appellate court pointed out that to permit the result the parties sought "would convert the solemn rite of marriage into a delusion and fraud." *Id.* at 6.

It may be readily conceded that a court of equity would hold the marriages in this case "valid" in the sense that it would not help to "convert the solemn rite of marriage into a delusion and fraud" by clearing away for the parties the legal debris of their scheme.⁴¹ But this scarcely aids

⁴¹ The parties in the instant case were careful not to take the courts so openly into their confidence. Both Lutwak, in

petitioners to show that, in the far different context of this case, the ceremonies they arranged were anything other than precisely "a delusion and a fraud". All petitioners have proved is that, without further concealments and misrepresentations, their conspiracy could well have failed in other ways than through the present prosecution.

And this is all that could conceivably be shown by the academic inquiry into French law upon which petitioners insist. Assume, for example, that the French ceremony would have created a "valid" marriage in the sense of making Bess Osborne unassailably the heir of Munio Knoll. And suppose Knoll had died immediately following that ceremony. Bess would have inherited and there would have been, from the viewpoint of at least some of the conspirators, a terrible mistake. But this means only that the conspirators may have risked legal consequences not only unsought, but shunned.

The same conclusion applies to any other concrete meanings of "validity" which may be imagined. The only important point is that, whatever a French marriage ceremony (or an American one, for that matter) is meant to signify in law, the ceremony was employed by petitioners only for the fraudulent purpose of representing the aliens as "spouses" entitled to enter the United States under the War Brides Act. French cere-

divorcing Maria, and Bess Osborne, in divorcing Munio Knoll, merely alleged desertion, omitting the details of the plan the record proves (R. 92, Govt. Ex. 19; R. 215, Dft. Romankiewicz Ex. B, and note 14, p. 16, *supra*).

monies are no more effective than American ceremonies to excuse such a fraud against American law.

V

The Trial Court Was Not Required in the Circumstances of This Case to Charge That a Second Marriage Is Presumed to Be Valid Where a Prior Marriage to a Spouse Still Living Has Been Shown

It was undisputed at the trial that petitioner Munio Knoll, who had entered the United States as the spouse of Bess Osborne, had been married in 1932 to Maria, who entered as the spouse of petitioner Lutwak. In his statements to the immigration authorities, which were in evidence, Munio first declared that he and Maria had been divorced by a court in Budapest. Later, he changed this statement and asserted that there had been a "Jewish divorce," not a civil decree (*ibid.*). Though he gave assurances that he could produce the divorce document, he never did, either for the immigration authorities or at the trial of this case. The certificate of the marriage between Munio and Bess Osborne, while it showed that she had been previously married and divorced, gave no similar information as to him (note 10, p. 12, *supra*). The Government proved, finally, that after their arrival in the United States, Munio and Maria lived together and represented themselves as husband and wife.

On this record, petitioners err in their assertion (Br. 50, 51-52) that there was no evidence to warrant the sentence in the trial court's instructions

to the jury (R. 339) charging that a bigamous marriage is void. Equally mistaken is the contention (Br. 50-51, 54) that the court should have further charged that a second marriage is presumed to be valid even to the extent of presuming a valid divorce from a prior spouse who is shown to be still alive.

The presumption petitioners invoke applies in civil cases where a marriage is collaterally attacked, ordinarily where the party to the bigamous or otherwise tainted marriage is not before the court, and where there are obviously no considerations of convenience or policy to weigh against the assumption that a solemn ceremony of marriage is valid.⁴² It is settled everywhere, however, that, in prosecutions for bigamy or adultery, where the marriage (the first marriage in bigamy cases) has been proved and where the defendant's spouse in that marriage is shown to be alive, there is no presumption of divorce and no burden upon the prosecution of proving the sweeping negative proposition that there has been no divorce.⁴³ In such cases,

⁴² Even in civil cases, it is highly questionable whether the presumption petitioners invoke would have been available in a case where the evidence pointed as strongly to an undissolved first marriage as did the evidence here. In the case of *In re Estate of Dedmore*, 257 Ill. App. 519, upon which petitioners rely (Br. 52, 54), the court said (at 523): "As soon as evidence is produced which is contrary to the presumption, the presumption vanishes entirely." But since, as we show immediately below, the presumption never comes into play in a criminal prosecution like the one in this case, it seems unnecessary to show at length that the instruction petitioners sought would, on still further grounds, have been improper.

⁴³ *Fuquay v. State*, 217 Ala. 4; *People v. Stokes*, 71 Cal. 263, 266; *People v. Huntley*, 93 Cal. App. 504; *State v. Martinez*, 43

the defendant before the court is obviously in the best possible position to prove that there has been a divorce, and the courts have consistently refused to assign to the prosecution the enormous burden of proving the contrary.

Summarizing the uniform rule, the Supreme Court of Indiana has written (*Fletcher v. State*, 169 Ind. 77, 78-79):

* * * Public policy, social convenience and safety often justify a resort to certain presumptions, and for such reasons a presumption of the validity of a marriage duly solemnized has been indulged in collateral proceedings of a civil nature involving private rights. [Citing cases.]

In a criminal charge of bigamy, brought by the State against a party to the marriage assailed, there is no occasion for resorting to presumptions, and we find no authority to sustain the doctrine for which appellant contends. In such case the accused has opportunities, above all others, of knowing whether a divorce has been granted, and if so, where proof of the fact may be obtained. Public policy and convenience do not require the State, in this class of cases, to search all records extant for proof of a negative fact peculiarly within the knowledge of the defendant; but when the State shows that the accused has been

Idaho 180; *People v. Spoor*, 235 Ill. 230; *Fletcher v. State*, 169 Ind. 77; *Lesueur v. State*, 176 Ind. 448; *Long v. State*, 192 Ind. 524; *State v. Barrow*, 31 La. Ann. 691; *Comm. v. Boyer*, 7 Allen (Mass.) 306; *Bennett v. State*, 100 Miss. 684; *State v. Pinson*, 291 Mo. 328; *Fleming v. People*, 5 Park. Crim. Rep. 353, affirmed, 27 N. Y. 329; *State v. Herron*, 175 N. Car. 754.

married to a woman who was still living at the time of his second marriage to another, it is incumbent upon him to show a divorce from such former wife.

This rule for criminal prosecutions was plainly applicable under the evidence here.⁴⁴ Munio's prior marriage, the fact that Maria was still alive, and evidence that Maria and Munio had held themselves out as married to each other were all before the jury. Against this damaging testimony, Munio offered only shifting stories of divorce and a promise, never fulfilled, to produce a document proving that divorce. In the circumstances, there was no occasion for a charge to the jury that there was a presumption that Maria and Munio had been divorced.

⁴⁴ Cited by petitioners as being "perhaps most directly in point" (Br. 52); the decision in *Prentis v. McCormick*, 23 F. 2d 802 (C. A. 6), is of no help to them. There, on an appeal from the granting of habeas corpus to an alien held for deportation, ruling only on the facts as shown in the pleadings, the court rejected the contention that the alien's second marriage had to be deemed to be bigamous. The pleadings showed that the alien had first been married in 1911 and that the second marriage under attack had occurred in 1921. There was no showing of the critical fact, uncontroverted in the instant case, that the spouse in the first marriage was still alive—a showing which is, of course, required where bigamy is to be proved and which, when it is made, renders unnecessary the proof of divorce by the prosecution or presumption upon which petitioners insist. Accordingly, in ruling that the pleadings did not show bigamy and in referring to the "presumption of validity" which attaches to a marriage ceremony, the court was at most giving effect to the rule, irrelevant here, that a spouse absent and unheard from for a period of years (seven at common law, but varying under the bigamy statutes) may be presumed to be dead. See *Parker v. State*, 77 Ala. 47, 51-52; *People v. Huntley*, 93 Cal. App. 504, 506.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgments of the Court of Appeals should be affirmed.

ROBERT L. STERN,
Acting Solicitor General.

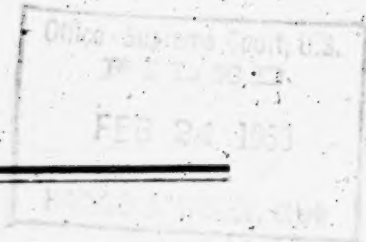
CHARLES B. MURRAY,
Assistant Attorney General.

MARVIN E. FRANKEL,
*Special Assistant to the
Attorney General.*

BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

DECEMBER 1952.

LIBRARY
SUPREME COURT U.S.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 66

MARCEL MAX LUTWAK, MUNIO KNOLL, AND
REGINA TREITLER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

ANTHONY BRADLEY EBEN,
RICHARD F. WATT,
BERNARD WEISSBOURD,
Counsel for Petitioners.

JOSEPH L. NELLIS,
DUNNING, NELLIS & LUNDIN,
Of Counsel.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1952.

No. 66.

MARCEL MAX LUTWAK, MUNIO KNOLL, AND
REGINA TREITLER,
Petitioners,
vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

*To the Chief Justice and the Associate Justices of the
Supreme Court of the United States:*

Petitioners respectfully pray for a rehearing in this cause and a reconsideration of this Court's opinion of February 9, 1953. In support of this petition, petitioners state to the Court as follows:

INTRODUCTION.

Because the decision of this Court has the highest precedent value, its impact in the fields of evidence, conspiracy, and trial tactics is sweeping. New and hitherto unthought

of rules of law have been adopted which revolutionize the entire concept of criminal responsibility and make conviction by association a real possibility. While investigating committees have heretofore extensively engaged in such practices, persons judicially accused of crime have until now always been secure in their belief that they could never be convicted by evidence of acts neither performed nor authorized by them. This decision, unless reconsidered, destroys that basic idea which has always clothed our criminal jurisprudence. Under the opinion of this Court in this case one charged with participating in a conspiracy may now be convicted by evidence of acts performed by another alleged conspirator after the termination of the conspiracy, merely upon a showing that the acts of the other were relevant in some respect to the conspiracy. In announcing this rule, this Court has overruled its own pronouncements to the contrary, repeated time and time again in over a hundred years of its history, and it has ignored or abandoned the further rule that evidence to be admitted must be not only relevant but also competent.

Unless this rule is reconsidered, startling changes in the admission of evidence have been authorized, proving that bad cases indeed do make bad law. Thus, where one is charged with having been associated in crime with another he will have admitted against him, merely because it is relevant, the flight, escape, or attempted suicide of that other person. By the same token he may be adjudged guilty because of the introduction of evidence that the one with whom he is charged with having associated in crime bribed, influenced, or intimidated a witness, juror, or prosecutor. He may find himself in prison because that other person destroyed or fabricated evidence. Proof that his associate committed like or similar crimes also under the rule announced by this Court will become admissible

against him. All of these matters are nearly relevant, but in the past have been limited to the one doing the act. This decision now opens wide the door so as to bind by these acts all persons charged with association in the common enterprise. • •

Further, this Court has affirmed these convictions upon a theory of the case never advanced by the government below and never considered by the jury, the trial court, or the Court of Appeals. The theory upon which petitioners were tried and under which evidence was admitted against them would here require a reversal. Nevertheless, if this decision is not reconsidered, petitioners must serve two years in prison for the commission of an offense never passed upon by the jury convicting them, and against which they never interposed a defense because of their reliance upon the failure of the government properly to prove the case against them in the setting adopted by the government and the trial court. This is entrapment of the worst sort and offends against every concept of due process.

Finally, the jury was instructed that the conspiracy continued up to the date of the indictment. This Court's decision, however, announced that the conspiracy terminated two and one-half years earlier. Consequently, the jury, under the instructions given it, could have found petitioners guilty on a finding of "overt acts", which, although charged in the indictment, this Court has found not to be in furtherance of the conspiracy.

Petitioners realize that petitions for rehearing are rarely granted; yet here, because of the widespread consequences which must follow this decision, they fervently hope that this Court, in its role of final dispenser of justice, will see fit to close the Pandora's box which this case has opened.

FOR PURPOSES OF THEIR ADMISSIBILITY INTO EVIDENCE POST-CONSPIRACY ACTS ARE NOT DISTINGUISHABLE FROM POST-CONSPIRACY DECLARATIONS. SUCH ACTS AND SUCH DECLARATIONS ARE INCOMPETENT AS TO ABSENT CONSPIRATORS SINCE NOT AUTHORIZED.

The handling of petitioners' objection to the general admission of acts and declarations after the termination of the conspiracy—by the government, by the trial court, and by the Court of Appeals—constitutes a remarkable example of legal broken field running. At the trial, relying upon the charge in the indictment of a subsidiary conspiracy to conceal, the government offered evidence of acts and declarations occurring after December 5, 1947. The trial court admitted much of this evidence against all the defendants on the theory, advanced by the government, that it was in furtherance of the alleged conspiracy to conceal the commission of the crime (see, *e. g.*, R. 66-67). Neither the government prosecutor nor the court, however, questioned the general rule prohibiting the admission against all conspirators of acts and declarations occurring after the termination of the conspiracy. Both the prosecutor and the court, impliedly conceding the rule, avoided its application by finding that the conspiracy had not terminated.

On appeal to the Court of Appeals, the conspiracy to conceal theory was quietly dropped by both the government and the court. The government there argued that since the conspiracy contemplated the procurement of divorces after the entry into the country, the conspiracy continued until those divorces had been obtained (Gov't Br., Ct. of App., pp. 38-40; Answer to Pet. for Rehearing, Ct. of App., pp. 19-20). But the Court of Appeals de-

clined to adhere either to the "conspiracy to conceal" theory or the "conspiracy to obtain divorces" theory. Rather it stated a quite different reason for upholding the admission of such post-conspiracy evidence, without in any way questioning the rule prohibiting the admission generally of post-conspiracy acts as well as declarations. The Court of Appeals wrote (R. 399):

Complaint is made that the court permitted evidence of events in America subsequent to the entries. When we remember that this case turned almost entirely upon the question of the validity of the Parisian marriages and that whether they were valid, in turn, depended upon the intent of the parties at the time the ceremonies occurred, it is clear that not only what was said and done prior to the time of the marriages, but that *the conduct of the parties and their statements after they returned to America* were relevant and competent for the jury to consider in determining whether in fact they reflected *an intent to have performed valid marriages or whether they tended to show that the intent was merely to pretend to be married.* (Emphasis added.)

In its Brief in Opposition to the Petition for a Writ of Certiorari, however, the government did not seek to defend the Court of Appeals' intent theory. Rather it reverted to the conspiracy to conceal the crime charge of the indictment, emphasizing that the case differed from *Krulewitch v. United States*, 336 U. S. 440 (1949), in that the conspiracy to conceal was charged here while only implied there. It also argued that the conspiracy included an agreement on the part of the husbands and wives to live apart after they came to the United States (pp. 19-22). In its main Brief (pp. 36-42), the government advanced the additional contention that the prohibition against post-conspiracy evidence applied to declarations only, and not to acts. *This was the first time that any such distinction*

between acts and declarations had been advanced: the prosecutor in the trial court, the trial judge, the government in the Court of Appeals, and the Court of Appeals in two opinions never once questioned the basic rule announced in *Logan v. United States*, 144 U. S. 263 (1892). In fact the government in its Brief in Opposition to the Petition for a Writ of Certiorari, while not discussing the rule explicitly, conceded its applicability to both acts and declarations in asserting, at page 22, that "the conspiracy was still operative at the time of all acts or statements of conspirators admitted in evidence against other participants."

Moreover, these varying views disclose that the conspiracy terminated at different times in different courts. In the trial court, there was a continuing conspiracy to conceal. But the Court of Appeals, in adopting the "intent" theory, apparently conceded that the conspiracy terminated at the date of last entry. The government, of course, despite some shift in emphasis, always asserted that the conspiracy continued beyond December 5, 1947. Thus, in the one respect in which it has been consistent, the government has been consistently wrong. For this Court's opinion now finally decides, as petitioners have contended in all courts, that the conspiracy ended on December 5, 1947. This Court announces a new basis for the general admission of post-conspiracy acts, however, and finds that the admission of one post-conspiracy declaration against all is harmless error. Thus as to declarations, at least, this Court declines to adhere to the view of the Court of Appeals. And as appears below, *this Court's reasoning goes far beyond anything announced by the courts or contended by the government below: it holds that post-conspiracy acts, if relevant, are admissible generally—against actor and non-actor alike.*

A.

In determining that the conspiracy ended on December 5, 1947, the date of entry into the United States of the third alien, Leopold Knoll, this Court rejects the contention advanced by the government, and spelled out in the indictment, that there was a subsidiary conspiracy to conceal the conspiracy which continued beyond December 5, 1947, since, although alleged, such a conspiracy was not proved. Consequently, the acts and declarations of the conspirators after that date could not be admitted into evidence generally against all conspirators on the theory that they were in furtherance of the subsidiary conspiracy to conceal.

Nonetheless the Court concludes that acts taking place after December 5, 1947 were properly admitted against all the conspirators, insofar as they were "relevant to show the spuriousness of the marriages and the intent of the parties in going through the marriage ceremonies * * *" (Op. p. 13). Or, as the Court expresses it in the following paragraph, these acts were "relevant to prove the conspiracy * * *" (Op. p. 14).

To reach this conclusion the Court draws a sharp distinction between acts and declarations. Declarations, being subject to a hearsay objection, are, according to the Court, only admissible against a co-conspirator when in furtherance of the conspiracy. This Court thus recognizes that such declarations must be competent as well as relevant. Yet apparently competency is not to be considered where post-conspiracy acts are under scrutiny, since this Court states that the cases dealing with declarations, such as *Krulewitch v. United States*, 336 U. S. 440 (1949), and *Fiswick v. United States*, 329 U. S. 221 (1946), have "no application to acts of a conspirator or others which were relevant to prove the conspiracy." The Court then

indicates that the language in *Logan v. United States*, 144 U. S. 263, 309 (1892), which refers to both acts and declarations as being covered by the rule is dictum, which "overlooks the fact that the objection to the declarations is that they are hearsay. This reason is not applicable to acts which are not intended to be a means of expression."

If it is submitted that the Court, in thus distinguishing between acts and declarations, has misconceived the rule excluding such evidence against absent co-conspirators after the termination of the conspiracy and has, in effect, overruled more than a hundred years of settled law, repeatedly announced by this and other federal courts, and as so understood applied in numerous cases.

B.

Preliminarily, it is necessary to emphasize that in a conspiracy trial, despite the form in which the indictment is drawn, each alleged conspirator is on trial as an individual. His guilt or innocence is to be determined by the evidence as to him. If the jury is not convinced that such evidence implicates him, he is entitled to an acquittal. Whether a defendant entered into any illegal agreement is to be decided solely from what he said and did—never from what someone else said and did.

As a general proposition, the declarations of a defendant constitute admissible evidence as against him. Whether or not there is a hearsay objection to the introduction of such declarations depends upon the manner in which they are sought to be proved. But once they are admitted against the declarer, the further question which arises in a conspiracy trial is whether such declarations may properly be admitted as against one or more co-defendants.

That question does not pose any hearsay problem. Rather it presents a straight-forward question of authority. For, quite obviously, whether what conspirator A has said, which is in evidence against A, may also go into evidence against conspirator B depends upon whether there is anything to indicate that B *authorized* A to make such a statement. This, then, is the significance of the formulation "in furtherance of the conspiracy." For if A and B, along with others, have agreed to a program of action in such a fashion as to bring a conspiracy into being, then A, B, and each of the others have mutually authorized each ~~other~~ to carry out the scheme. What A then says, in furtherance of the scheme, he says as the agent for the others, and at the trial what A said constitutes competent evidence against B and the others, as well as against A, the declarer.

Thus to get A's declaration into evidence against B, two determinations must be made; *first*, it is necessary to conclude that the declaration is admissible against A; and *second*, once it is held to be admissible against A, it is necessary to find that a conspiracy existed and that the declaration was in furtherance of it, since under those circumstances it follows that B authorized A to say what he did or, put another way, that A made the statement as the agent for B, thus making the statement competent. Analyzed in this fashion, it is plain that any hearsay objection can arise at the first stage only, that is, when nothing but the admissibility of the statement against the declarer is involved. At the second stage, the question involves a problem of the law of agency. At that stage it has absolutely nothing to do with hearsay.

It likewise appears, from this analysis of the matter, that in determining the problem at the second stage, *i.e.*, whether what A said is competent as against B, the considera-

tions are identical regardless of whether the evidence offered is A's declaration or A's act. For, the hearsay problem, if any, having been resolved at the first stage, *the subsequent determination relates solely to A's authority to act or speak for B.* Depending upon the nature of the charge, therefore, the problem is: Was A the agent for B and was he acting in the course of his agency in saying or doing what he did? Or were A and B co-conspirators and was what A said or did in furtherance of the conspiracy? Thus in an agency case the basis of a ruling that the evidence as to A, the agent, may be admitted against B, the principal, is the determination that the action or statement was "within the scope of the agent's authority", while in a conspiracy case the same problem is formulated in terms of whether the action or statement was "in furtherance of the conspiracy." Apart from the difference in language, however, the problems and their solutions are identical.

C.

The text-writers, both in this country and in England, have analyzed and discussed the problem in this fashion, and so has this Court and numerous lower federal courts. The coupling of "acts" and "declarations" in these texts and decisions overlooks nothing; rather it involves giving proper recognition to the fact that the basic problem relates to the law of principal and agent. In fact, the definition of a conspiracy as "a partnership in crime" is sufficient, without more, to reveal that the underlying issues of relationship and authority are problems of agency. The following authorities are typical:

Underhill, *Criminal Evidence* (3d ed. 1923), § 718, pp. 961-63:

When men are associated for a common purpose, and with a common object in view, the law, presuming

that the benefits, if any, which may ensue from their accomplishment will be shared by all, impresses upon the conspirators or partners, collectively, the attribute of individuality so far as the common design is concerned. No member of the combination will be permitted to escape the consequences of the actions or words of his associates. Such acts and declarations are also admissible on the grounds of agency. *But the acts and declarations in order to be admissible must have been made in furtherance of the common design or must accompany and explain such act or declaration. Acts and declarations which do not relate to the conspiracy or which are not in furtherance thereof are not admissible over objection.* (Emphasis added.)

Phipson, *The Law of Evidence* (8th ed. 1942), p. 89:

So, acts and declarations *after* the event conspired for has happened, are not generally receivable, since these cannot be in furtherance of the common purpose.

Wigmore, *Evidence* (Vol. IV), § 1079, pp. 130-31:

The tests therefore are the same, whether that which is offered is the act or the admission of the co-conspirator; in other words, the question is purely one of criminal law, or of conspiracy as affecting joint civil liability, and its solution is not to be sought in any principle of Evidence. (Emphasis added.)

See also, to the same effect, Greenleaf, *Law of Evidence* (1897) Vol. I, § 111, pp. 174-77; Stephen, *A Digest of the Law of Evidence* (Fourth Eng. ed 1892), Art. 4 (Acts of Conspirators), pp. 10-11.

The language "acts and declarations" has been used many times by this Court and in fact appears to be a formulation developed from Mr. Justice Story's opinion in *United States v. Gooding*, 12 Wheat. 460 (1827). The problem there had to do with evidence as to declarations of the master of a ship which were sought to be introduced against the ship-owner, who was on trial for viola-

tion of the slave trade act. In answering the problem posed by the offered evidence, Mr. Justice Story wrote as follows, at page 469:

Whatever the agent does, within the scope of his authority, binds his principal, and is deemed his act. It must, indeed, be shown, that the agent has the authority, and that the act is within its scope; but these being conceded, or proved, either by the course of business, or by express authorization, the same conclusion arises, in point of law, in both cases. Nor is there any authority for confining the rule to civil cases. On the contrary, it is the known and familiar principle of criminal jurisprudence; that he who commands, or procures a crime to be done, if it is done, is guilty of the crime, and the act is his act. This is so true, that even the agent may be innocent, when the procurer or principal may be convicted of guilt, as in the case of infants, or idiots, employed to administer poison. The proof of the command, or procurement, may be direct or indirect, positive or circumstantial; but this is matter for the consideration of the jury, and not of legal competency. *So, in cases of conspiracy and riot, when once the conspiracy or combination is established, the act of one conspirator, in the prosecution of the enterprise is considered the act of all, and is evidence against all.* Each is deemed to consent to, or command, what is done by any other in furtherance of the common object. (Emphasis added.)

In applying this decision in *American Fur Company v. United States*, 2 Pet. 358 (1829), Mr. Justice Washington wrote, at page 364:

The principle asserted in the decision of that point, and applied to the case was, that *whatever an agent does, or says, in reference to the business in which he is at the time employed, and within the scope of his authority, is done or said by the principal; and may be proved, as well in a criminal as a civil case; in like manner as if the evidence applied personally to the principal.* (Emphasis added.)

In *Logan v. United States*, 144 U. S. 263, 309 (1892), Mr. Justice Gray, when stating the rule which this Court finds overlooks the hearsay objection to declarations, cites the *Gooding* case. Mr. Justice Jackson, in *Brown v. United States*, 150 U. S. 93, 98 (1893), likewise uses the formulation "acts and declarations", citing Mr. Justice Gray's opinion in the *Logan* case, in addition to other authorities. In *Wiborg v. United States*, 163 U. S. 631, 657 (1896), Mr. Chief Justice Fuller states the rule as announced by Mr. Justice Washington in the *American Fur Company* case. And more recently, in *Fiswick v. United States*, 329 U. S. 211 (1946), where the problem had to do with statements, Mr. Justice Douglas announced the rule as follows, at page 217:

*While the act of one partner in crime is admissible against the others where it is in furtherance of the criminal undertaking, Pinkerton v. United States * * * all such responsibility is at an end when the conspiracy ends. Logan v. United States, 144 U. S. 263, 309. * * * Brown v. United States, 150 U. S. 93, 98. * * * (Emphasis added.)*

See also the language used by Mr. Justice Brown in *Bannon v. United States*, 156 U. S. 464, 469 (1895), and by Mr. Justice Brewer in *Clune v. United States*, 159 U. S. 590, 593 (1895). And cf. *Queen v. Blake and Tye*, 6 Q. B. 126 (1844).

The lower federal courts, citing one or more of these Supreme Court opinions, have likewise adhered to the formulation "acts and declarations", and their decisions are indicative of a consistent recognition that the problem is one of agency. For example, see *United States v. Gardiner*, Fed. Cas. No. 15,186a, 25 Fed. Cas. 1245, 1252 (C. C. D. C. 1853); *Heard v. United States*, 255 Fed. 829, 834 (C. A. 8th, 1919); *Merrill v. United States*, 40 F. 2d 315, 316 (C. A. 5th, 1930); *Minner v. United States*, 57 F.

2d 506, 511 (C. A. 10th, 1932). In *United States v. Lekacos*, 151 F. 2d 170 (C. A. 2d 1945), rev'd *sub nom. Kotteakos v. United States*, 328 U. S. 440 (1946), Judge Learned Hand wrote, at page 172: /

The acts and declarations of confederates, past or future, are never *competent* against a party except in so far as they are steps in furtherance of a purpose common to him and them. *Declarations are no different from other acts; they become competent only when they are uttered in order to accomplish the common purpose.* (Emphasis added.)

The same view is apparent in the opinion in *Sabbatino v. United States*, 298 Fed. 409 (C. A. 2d 1924), where Sabbatino claimed that the evidence did not connect him sufficiently with the others to justify finding that he was a conspirator. His contention was that most of the evidence against him related to his acts after the conspiracy, to bribe federal prohibition officers, had terminated. In affirming, Judge Hough wrote, at page 412:

Under this head of argument the well-known doctrine of the Logan Case, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429, is invoked. The decision does not apply here, for, admitting fully that the acts or declarations of one conspirator, made after the conspirator has ended, are not admissible against the other conspirators, and admitting (but not holding) that many, if not most, of the acts of Ralph Sabbatino given in evidence occurred after the conspiracy had ended, it remains untrue that a conspirator may not be convicted by his own acts, no matter when those acts occurred. *The prohibition is against affecting the plurality by the acts of one, committed after the scheme has terminated either in success or failure; but the one always remains affected by his own acts. That is the inexorable law of all life.* (Emphasis added.)

In *Giordano v. United States*, 9 F. 2d 830 (C. A. 2d 1925), which involved a conspiracy to bring aliens into the United

States in violation of the immigration laws, evidence was admitted generally with regard to a repayment of money by one of the conspirators to one of the aliens after the termination of the conspiracy. The court held that this evidence was improperly admitted in view of the rule of the *Gooding*, *Logan*, and *Brown* cases. Since only one act was involved, however, the court ruled that the error was non-prejudicial.

Acts before a conspiracy is formed are likewise inadmissible generally, since obviously not in furtherance of the conspiracy. Thus in *Morrow v. United States*, 11 F. 2d 256 (C. A. 8th, 1926), the court reversed convictions for conspiracy to violate the bankruptcy act because certain financial transactions of one of the conspirators were admitted into evidence generally even though they had taken place several months prior to the time fixed in the indictment as the commencement of the conspiracy. In announcing the rule to be applied, Judge Kenyon cited the *Brown* and *Logan* decisions, along with many others. In a similar case, the same court, again through Judge Kenyon, reached the same result. *Gerson v. United States*, 25 F. 2d 49 (C. A. 8th, 1928). And see *Miller v. United States*, 133 Fed. 337, 353 (C. A. 8th, 1904); *Wilson v. United States*, 109 F. 2d 895, 896 (C. A. 6th, 1940).

Moreover, the decisions cited above make it abundantly clear that evidence of acts offered against all conspirators becomes competent against all because, and only because, the acts are held to be in furtherance of the conspiracy, and they invariably assume that acts committed either before or after the period involved in the conspiracy cannot be in furtherance of the conspiracy. In this connection, the following additional decisions are in point: *Hitchman Coal & Coke Co.*, 245 U. S. 229, 249 (1917); where in holding that certain acts and declarations "in furtherance of

the common object" were admissible against the defendants, Mr. Justice Pitney observed that the rule admitting such evidence against defendants other than the actors or declarers "originated in the law of partnership"; *Pinkerton v. United States*, 328 U. S. 640, 645-48 (1946); *Murphy v. United States*, 285 Fed. 801, 815 (C. A. 7th, 1923); *United States v. Food and Grocery Bureau of Southern California*, 43 F. Supp. 966, 969-73 (S. D. Calif. 1942).

D.

This Court cites no authority whatsoever for its view that acts stand on a different footing from declarations. And for its assertion that acts which are relevant to prove the conspiracy are admissible "even though they might have occurred after the conspiracy ended", it cites, in addition to the *Rubenstein* case, only *Fitzpatrick v. United States*, 178 U. S. 304 (1900), and *Ferris v. United States*, 40 F. 2d 837 (C. A. 9th, 1930). But the language of Mr. Justice Brown in the *Fitzpatrick* case, at pages 312-13, emphasized that to constitute competent evidence for the jury the facts offered must be "part of the whole transaction" * * * "occurring at any time *before the incident was closed*" * * * or taking place from the time the crime "was first contemplated *to the time the transaction was closed*." (Emphasis added.) Likewise in the *Ferris* case, in which evidence as to the conduct of two defendants after their arrest was admitted against other conspirators, the appellants, the court concluded, at page 839, that the conspiracy *had not terminated* at the time of the arrest of those two defendants but "continued until the arrest of appellants." Yet here, even though this Court determines that "on this record * * * the conspiracy ended December 5, 1947," numerous acts taking place as long as two-and-a-half years after that date are held to be admissible against absent conspirators.

Nor can this holding rest upon *United States v. Rubenstein*, 151 F. 2d 915, 917 (C. A. 2d, 1945). For there the evidence was admitted in order to *corroborate* the testimony of the spouses as to what they had originally intended and agreed upon. Here, however, three marriages are involved, and the acts of all six parties to those marriages after entry—and after termination of the conspiracy—were admitted generally, even though only one party to one marriage, Bessie Osborne, had testified adversely on the question of her and Munio Knoll's intent in getting married. Thus there was only one marriage with respect to which there was any spousal testimony indicating lack of proper marital intent to be corroborated. As a matter of fact, the testimony of Grace Knoll was to the effect that she and Leopold Knoll intended to be married in the fullest sense of the word; and so did the testimony of Maria Lutwak concerning her marriage to Marcel. Evidence of the acts of the parties to those two marriages after the termination of the conspiracy thus did not and could not corroborate spousal testimony showing lack of intent.

In addition, this Court has overlooked petitioners' argument that in any event the acts occurring after the conspiracy were not relevant as to those who took no part in them (Pet. Reply Br., p. 6). Thus, even under the Court's reasoning here, such acts should have been limited to those defendants performing them.

II.

THE BASIC ELEMENT UNDERLYING PETITIONERS' CONVICTIONS BY THE JURY WAS THE ASSERTED INVALIDITY OF THE MARRIAGES. HENCE THE NATURE OF THE MARRIAGES WAS MOST MATERIAL. THE GOVERNMENT FAILED TO PROVE INVALIDITY, AND CONGRESS IN ENACTING THE WAR BRIDES ACT DID NOT INTEND TO EXCLUDE THOSE VALIDLY MARRIED.

The case in the trial court turned on the question as to whether the marriages were invalid. It was submitted to the jury on that theory and the trial court instructed extensively on that point (R. 338-340). An examination of the instructions indicates beyond question that the jury could not have found petitioners guilty without deciding that the marriages were invalid. Because of the adherence of the trial court to the theory that the invalidity of the marriages was the core of the case and because that invalidity had not been proved by the law of the place where they occurred, the trial court indulged in the "assumption" that "the law of Paris, France" is the same as that of Chicago, Illinois (R. 189).

The Court of Appeals also adopted this theory of the case, stating that, "if valid marriages came into being the fact ~~that~~ the motives back of them were entries into this country would be wholly immaterial" (R. 392), and "before the jury could properly conclude that the scheme became an alleged conspiracy, it was necessary that the evidence be sufficient to justify the conclusion that the three marriages were void—of no legal effect—and that, they were so intended, for, if they were valid, the government cannot complain" (R. 393), and "we are confronted, then, with the crucial question of whether the evidence justifying a finding that the so-called marriages were void" (R. 395-396). In order to overcome the failure of the government

to prove invalidity by French law, the Court of Appeals also engaged in the erroneous presumption that the marriage laws of a foreign country are presumed to be the same as those "obtaining in the forum" (R. 414). That court based its decision on the ground that the marriages were sham and void under the law of his country (R. 396).

In this Court, the government abandoned the theory upon which the case was tried and submitted to the jury and argued here for the first time that the validity of the marriages in question was immaterial (Gov't Br., pp. 66-75). This Court has apparently accepted that view (Op., pp. 7-8), although it refers to the marriages between the parties as "pretended marriage ceremonies" (Op., p. 5), "spurious, phony marriages" (Op., p. 5), "fake marriages" (Op., p. 7) and "ostensible marriages" (Op., p. 9). This Court's inconsistency in stating that it does "not believe that the validity of the marriages is material" (Op., p. 7) is clearly demonstrated by its later statement that "the *essential fact* of the conspiracy was the existence of *phony marriage ceremonies* entered into for the sole purpose of deceiving the immigration authorities and perpetrating a fraud upon the United States" (Emphasis added) (Op., p. 13).

Apart from this, however, since this Court has found ample evidence of a conspiracy to defraud the government, it is obvious that under the charge in the indictment petitioners must have schemed to accomplish their purpose either by misrepresenting that there were valid marriages or by concealing the true nature of the marital relationships, or both. Under that charge the misrepresentation or the omission to disclose could have arisen only in connection with the execution of applications for admission to the United States by the aliens—Maria, Munio, and Leopold (Gov't Exs. 1, 2, and 3). The application of Munio

Knoll—Zygmunt Roman-Kiewicz—Exhibit No. 2, is appended to this petition. The other applications are similar in all respects.

The making of such applications was required by a regulation issued by the Commissioner of Immigration and Naturalization. Title 8, U. S. C. A. § 222; 8 Code of Fed. Reg., 1949 Supp., Part 126, pp. 90, *et seq.* The regulation had the force and effect of law. *Mastrapasqua v. Shaugnessy*, 180 F. 2d 999 (C. A. 2d, 1950); *Hamburg-American Line v. United States*, 65 F. 2d 369 (C. A. 2d, 1933). By that regulation and the application forms which were issued under it, that which was material to entry was defined.

An examination of the applications indicates that the aliens made claim that they were non-quota immigrants under the provisions of the War Brides Act. In support of their claim they were required to state that they were married to honorably-discharged veterans of World War II. In addition, they acknowledged that all excludable classes of aliens had been explained to them and that they were not members of any such class. The excludable classes set forth on the application forms did not refer in any way to an alien contracting a marriage for the sole purpose of securing entry.

The three aliens answered fully all inquiries put to them by the applications, stating they were married to veterans, the dates and places where the marriages took place, and the military and discharge status of their spouses. The application forms prepared by the United States Department of Justice asked for those facts *and nothing more*.

Having given the government the facts it demanded, were the aliens nonetheless required to state something additional, particularly in view of the fact that a long list of excludable classes had been recited to them? And if

they had stated their intentions to separate from their spouses upon entry, could they have been excluded under any law of the United States?

If there was a duty upon the aliens to speak further it arises only from the construction of the War Brides Act by this Court to the effect that when Congress used the words "alien spouse" it referred to one of "two parties who have undertaken to establish a life together and assume certain duties and obligations" (Op., p. 7). Thus this Court now contends, by reason of its affirmance of the convictions below, that these three aliens in Paris, France in 1947 should have known what this Court in 1953 says Congress must have intended in passing the Act, in the absence of any evidence of such intent, and even though three Justices cannot agree with that interpretation.

Conceding, *arguendo*, the intent of petitioners to enter into marriages for the sole purpose of securing entry into this country, and conceding further their intention to separate upon arrival, the record is completely empty of any evidence of their intent to conceal this information from the immigration authorities. Thus, even if there be a concealment, there could be no fraud upon the government since the intent to conceal was never proven.

In interpreting the Congressional intent underlying the War Brides Act, this Court made no reference to the source material from which such intent is usually ascertained. As a matter of fact, there was no need for this Court to consider what Congress had in mind when it passed the War Brides Act, since the statute is completely unambiguous. *Osaka Shosen Kaisha Line v. United States*, 300 U. S. 98 (1937); *United States v. Corbett*, 215 U. S. 233 (1909). The word "spouses" in the Act is clear and conclusive and can only mean persons legally wedded.

But even if the intent underlying the War Brides Act is

to be considered, this Court's conclusion is insupportable under familiar principles of statutory interpretation. In the first place, it is evident that Congress, in passing this Act, intended to *expedite* the procedures by which alien husbands and wives of veterans of World War II could enter this country. And that was all, for prior to the passage of that Act, Congress had made provision for the entry of such spouses. Thus a citizen of the United States, by filing a petition under Title 8, U. S. C. A., § 209 (b), could obtain the entry of an alien wife, no matter when they were married, and of an alien husband, if married prior to July 1, 1932, as non-quota immigrants. Title 8, U. S. C. A., § 204 (a). Alien husbands married to citizen wives after July 1, 1932 could be admitted under the same procedure as preference-quota immigrants. Title 8, U. S. C. A., § 206 (a) (1) (A).

In setting forth those eligible to enter as above, Congress referred to them as "the wife or the husband of a citizen of the United States", Title 8, U. S. C. A., § 204 (a), and "the husbands of citizens of the United States by marriages occurring on or after July 1, 1932," Title 8, U. S. C. A., § 206 (a) (1) (A). Moreover, in cases arising under those statutes the courts have always determined whether one is a husband or a wife by referring to the law of the place where the marriage was contracted. *Consulich Società Di Navigazione v. Elting*, 66 F. 2d 534 (C. A. 2d, 1933); *Ex parte Soucek*, 101 F. 2d 405 (C. A. 7th, 1939). Even the case of *United States v. Rubenstein*, 151 F. 2d 915 (C. A. 8d, 1945), cited by this Court against petitioners, stands for this proposition, since the marriage there was ruled invalid in the light of the law of New Jersey, the place where the marriage occurred.

Further, in 1937, Congress passed a statute which provided that a non-quota or preference-quota alien, who had been admitted on the representation that he was married

to a citizen but who subsequently secured a judicial annulment of such marriage retroactive to the date of its celebration, was to be deported on the ground that, because of fraud, he was not entitled to admission when he arrived in the United States. Title 8, U. S. C. A., § 213 (a). Thus the cases cited by petitioners (Pet. Br., p. 47), holding that an annulment would not be granted under the circumstances of this case are indeed most material.

In passing the War Brides Act, Congress is presumed to have had in mind prior legislation on the same subject, as well as judicial decisions construing that legislation. The War Brides Act should be construed in the light of the prior statutes and decisions. *United States v. Jefferson Elec. Mfg. Co.*, 291 U. S. 386 (1934).

When this rule of statutory construction is applied it follows that Congress, in enacting the War Brides Act, must have intended that all those validly married by the law of the countries where the marriages took place were admissible except where an annulment relating back to the date of marriage was secured. If this is so, there could here have been no concealment of a material fact, since petitioners fully stated to the immigration authorities all that Congress required them to state. In addition it is pointed out that even now under the new Immigration Act, Title 8, U. S. C. A., § 1251(c), Congress has not gone as far as this Court but has made deportable only one who is divorced within two years after securing entry by virtue of a marriage, unless the Attorney General is satisfied that such marriage was not contracted for the purpose of evading the immigration laws. In this case no divorce took place within two years of entry.

Further, an extensive search of the statutes indicates no legislation by virtue of which the aliens here could have been excluded if they had fully stated to the immigration authorities their intention subsequently to secure divorces.

if the marriages were in fact valid. If they were invalid, then this Court is faced with determining the question of the necessity of proving invalidity by French law, a question which it has avoided answering.

The case of *United States v. Rubenstein*, 151 F. 2d 915 (C. A. 2d 1945), relied upon by this Court as supporting its view^o (Op., p. 8) is distinguishable. In that case, the alien entered by virtue of a petition filed by a citizen of the United States pursuant to Title 8, U. S. C. A., § 204. Under the terms of that statute the citizen was expressly required to state that he would be responsible for the support of his wife. Title 8, U. S. C. A., § 209(b)(6). This was not so in the applications here. The court there found that the omission to state that the parties intended to obtain a divorce amounted to the concealment of a fact which was material to the admission of the alien, because it related to the statement concerning support of the alien after entry. As stated above, the decision was further buttressed by a finding by that court that the marriage itself was invalid, based upon an application of the law of New Jersey.

III.

PETITIONERS HAVE BEEN DEPRIVED OF DUE PROCESS OF LAW AND THEIR RIGHT TO A TRIAL BY JURY IN THE FOLLOWING RESPECTS:

THE ADMISSION OF POST-CONSPIRACY ACTS IN THE TRIAL COURT WAS UPON A BASIS ENTIRELY DIFFERENT FROM THAT FOR THE FIRST TIME ANNOUNCED BY THIS COURT.

THE TERMINATION OF THE CONSPIRACY ON DECEMBER 5, 1947 INEVITABLY INVALIDATES A SUBSTANTIAL PORTION OF THE TRIAL JUDGE'S CHARGE TO THE JURY.

THE THEORY OF THE OFFENSE STATED IN THIS COURT'S OPINION IS NOT THE SAME AS THAT UPON WHICH THE JURY WAS INSTRUCTED AND THE CASE SUBMITTED.

The manner in which this case has progressed through the courts—spawning new rules at one stage and repudiating them at the next, changing character so as better to avoid awkward legal principles, transforming the question around which the contest in the trial court entirely centered into an issue “not material” (Op., p. 7), and rendering surplusage the lengthy instructions given the jury as to the validity of the marriages, with the government altering its views and arguments in each succeeding brief—raises a serious question as to whether or not defendants, confronted by such shifts and turns, can in any real sense be said to have had a fair trial. After all, the defense of persons under criminal indictment should not degenerate into a guessing game, in which defendants' counsel are burdened with the impossible task of anticipating at the trial all the theories the government will not advance until appeal, and of deciding what to do on the basis of hunches as to which of the rules of evidence accepted by the government and the trial court for purposes of the trial will be radically altered retroactively by a higher court.

In this case, after a careful analysis of the record in the light of the indictment, the government's presentation of its case, the court's instructions to the jury, and the rules of evidence upon which testimony was admitted, rejected, or limited, counsel for the defendants determined not to present a defense. As stated to the trial court "it has become the conclusion of counsel for defendants jointly that on the present state of the record, we will not put in any defense. * * * " (R. 289).

Counsel's decision took into account the following: (1) that the case as presented by the government and as submitted to the jury under the court's instructions raised as a crucial issue the validity of the marriages, and that the misrepresentation the jury was asked to find as an objective of the conspiracy was a misrepresentation as to marital status, i. e., that so-and-so was married when in fact he was not; and (2) that acts and declarations of conspirators taking place after the termination of the conspiracy—which petitioners contended occurred on December 5, 1947—were inadmissible as to absent co-conspirators.

It is obvious that the trial court and the Court of Appeals entertained the same assumptions: they viewed the issues at the trial in the same light as petitioners' counsel, and they acknowledged the rule that acts and declarations are inadmissible against absent co-conspirators if occurring after the termination of the conspiracy. The instructions leave no doubt that the validity or invalidity of the marriages constituted the key issue in the trial court's concept of the case; and the Court of Appeals was most explicit in announcing its agreement (R. 392, 395, 399, 413). And both courts tacitly gave recognition to the rule about acts and declarations after the termination of the conspiracy, while finding novel and different ways of avoiding its application.

A.

As to the rule concerning acts and declarations after the termination of the conspiracy, petitioners' counsel, the trial court, and the Court of Appeals would appear to have been amply justified in relying upon the authoritative statements to be found in numerous decisions and texts. Some of these have already been cited above, and doubtless if counsel had the time to run down all the pertinent authorities, dozens and dozens of other pronouncements of the rule could be found. But more, counsel have been unable to locate any decision or text which announces the rule which this Court has evolved. To the best of counsel's knowledge, there is no expression of such a rule, and the very fact that the government and the trial court resorted to a subsidiary conspiracy to conceal theory and that the Court of Appeals announced an "intent" theory is persuasive indication that what this Court says is now the rule has never before been said to be the rule by any authority. For it would be more than a waste of effort, it would be ridiculous for the government and the lower courts to try so hard to circumvent the post-conspiracy acts and declarations rule if in fact that rule had been what this Court states it to be.

Since this rule has never before been given expression, while the "acts and declarations" formulation has been enunciated upon innumerable occasions and rarely if ever questioned, the action of this Court in applying its new rule retroactively has the effect, under the circumstances of this case, of changing the rules under which guilt or innocence is to be found after the trial is over. Had the government urged the rule which this Court now announces at any stage prior to filing its main Brief in this Court—a week before oral argument on December 8, 1952—or had the trial court stated that such was the rule, the

situation would have been quite different. But the prosecutor said nothing whatsoever to suggest that he understood the law the way this Court has now shaped it; nor did the trial court. On the contrary, everything the prosecutor and the trial court did and said indicates beyond all doubt that they thought the rule in *Logan v. United States*, 144 U. S. 263 (1892), meant just what it said. For the tactics and arguments of the prosecutor and the comments and rulings of the trial court were directed, not at changing the rule by deleting the word "acts" from its formulation, but at circumventing it on the basis of a charged conspiracy to conceal the crime.

In this connection the opinion of Mr. Justice Cardozo in *Shepard v. United States*, 290 U. S. 96 (1933), is very much in point. There evidence was offered and admitted on the theory that it constituted a dying declaration of the defendant's wife indicating her suspicion that her husband had poisoned her, the defendant being charged with her murder. When it appeared in the Court of Appeals that the facts did not warrant admitting this evidence as a dying declaration, the government contended that in any event it was admissible to rebut defense testimony tending to show that the wife had in mind the possibility of committing suicide, since it showed a state of mind inconsistent with the presence of any such thought. The Court of Appeals decided that although inadmissible as a dying declaration the evidence might go in on that newly-suggested ground. This Court reversed, and in the course of his decision Mr. Justice Cardozo wrote, at pages 102-3:

The testimony was neither offered nor received for the strained and narrow purpose now suggested as legitimate. It was offered and received as proof of a dying declaration. * * * There is no disguise of that purpose by counsel for the Government. They concede in all candor that Mrs. Shepard's accusation

of her husband, when it was finally let in, was received upon the footing of a dying declaration, and not merely as indicative of the persistence of a will to live. *Beyond question the jury considered it for the broader purpose, as the court intended that they should.* A different situation would be here if we could fairly say in the light of the whole record that the purpose had been left at large, without identifying token. There would then be room for argument that demand should have been made for an explanatory ruling. *Here the course of the trial put the defendant off his guard. The testimony was received by the trial judge and offered by the Government with the plain understanding that it was to be used for an illegitimate purpose, gravely prejudicial. A trial becomes unfair if testimony thus accepted may be used in an appellate court as though admitted for a different purpose, unavowed and unsuspected.* (Emphasis added.)

Here the reason for admitting much of the post-conspiracy evidence was stated by the trial court in the presence of the jury (R. 67-68), and the jury was reminded of the continuing conspiracy to conceal in the court's instructions (R. 335). Petitioners' counsel unsuccessfully objected that a charge of a conspiracy to conceal violated this Court's decision in *Krulewitch v. United States*, 336 U. S. 440 (1949), and although this Court has not repudiated the charging of a conspiracy to conceal, it did hold that no such conspiracy had been proved. Consequently, this Court found that the conspiracy terminated on December 5, 1947.

Thus the post-conspiracy acts could not go into evidence on the trial court's theory. Apparently the Court of Appeals recognized this, but it nonetheless concluded that on the defendants' intent the evidence was proper (R. 399). Offering evidence for the purpose of showing intent is quite different from offering it for the purpose of showing a

subsidiary conspiracy to conceal, and the "intent" rationale expressed by the Court of Appeals was "unavowed and unsuspected" at the trial stage. Likewise, offering evidence for the purpose of showing a conspiracy to commit certain substantive offenses and to defraud the United States is quite different from offering it for the purpose of showing a subsidiary conspiracy to conceal the principal conspiracy. The new rationale, expressed by this Court for the first time, was equally "unavowed and unsuspected" at the trial.

Moreover, this Court has only in part abandoned the "intent" rationale for the broader "proof of the conspiracy" view, since it considers that post-conspiracy acts "relevant to show the spuriousness of the marriages and the intent of the parties in going through the marriage ceremonies were competent * * *" (Op., p. 13). Thus, insofar as the "intent" theory of the Court of Appeals persists in this Court's decision, evidence improperly admitted on one basis is now considered to have been properly admitted on a much more limited basis. Where evidence is admitted to show intent, the jurors should be so advised in order that they will not erroneously consider it for some other purpose. But since no one even hinted at the trial that the purpose of this evidence was to show intent, defendants had no occasion to ask for an appropriate instruction. The course of the trial put them off guard.

B.

This Court's ruling that the conspiracy terminated on December 5, 1947—a ruling which petitioners' counsel vainly sought in the trial court—when superimposed upon the case works some startling changes, since the indictment, the trial, and the charge to the jury all proceeded upon the view that the conspiracy continued right up to

the date of the indictment. No juror could possibly have suspected that the conspiracy ended on December 5, 1947, for the court instructed the jury as to what the charge was—including the continuation of the conspiracy—and then gave the indictment to the jury to take to the jury-room (R. 333, 335, 343). Thus the only way in which a juror could have reached the conclusion which this Court now announces as to the termination of the conspiracy was by disregarding what he was told by the trial court he was duty-bound to follow (R. 328).

In addition to the continuing conspiracy to conceal, which this Court finds was not proved, the indictment charged a conspiracy to commit certain offenses and to defraud the government from on, or about July 1, 1947 "and continuously thereafter up to and including the date of this indictment * * *" (R. 4), it being part of the conspiracy that after the conspirators had secured the entry of the three aliens "the parties to the aforesaid ostensible marriages would not live together in the United States as man and wife and thereafter would take such legal steps to sever the formal bonds of said ostensible marriages as they saw fit" (R. 6-7).

None of the courts which have considered this case have made any ruling as to the effect or significance of this part of the charge of conspiracy. But adopting this Court's view that "there is no statement in the indictment of a single overt act of concealment that was committed after December 5, 1947, and no substantial evidence of any," the overt acts listed in the indictment as occurring after December 5, 1947 can only be regarded as overt acts in carrying out that part of the conspiracy whereby the parties to the marriages would not live together and would obtain divorces. Thus overt acts Nos. 15 through 21, if they are overt acts in the carrying out of a conspiracy at all, can only be viewed as in furtherance of the con-

spiracy to live separate and apart and to obtain divorces (R. 8-9).

The trial court charged the jury as follows (R. 336-37):

Your inquiry should be: First, Did the defendants, or some of them, conspire together to do the unlawful acts charged in the indictment? And, second, if they did so inquire, Did they thereafter, *with the view of carrying out the object of such conspiracy, do one thing set forth as an overt act in the indictment towards that end?* If they did so conspire together and take one or more steps, set forth as overt acts, toward the accomplishment of that unlawful purpose, the offense of conspiracy is complete, even though the object of the conspiracy is never attained.

You will observe that the Government and the grand jury have, in this indictment, charged many overt acts. An overt act means an act done for the purpose of carrying out the design, the unlawful purpose, and it must be done by one or more members of the conspiracy, if it has been found that there was a conspiracy, and must be of such a character as appears to you to have been done in order to carry out the unlawful purpose. It is not necessary that you find that all of the overt acts charged were performed, *but it is necessary that you find that at least one of the overt acts charged was done, and done with the intent of accomplishing the purpose of the conspiracy, before you would be warranted in finding the defendants, or any of them, guilty under this conspiracy count.* (Emphasis added.)

When these instructions are read together with those in which the court described to the jury the charge in the indictment that as part of the conspiracy the parties, having secured entry, would not live together in the United States and would take such steps as were necessary to sever the bonds of marriage (R. 335), it is apparent that the jury could have found the petitioners guilty of agreeing to obtain divorces after entering the United States, and

that one overt act—perhaps No. 21, Marcel's divorcing Maria—was done with the intent of accomplishing that purpose of the conspiracy. But the conspiracy terminated, this Court has ruled, on December 5, 1947—some two years and four months before Marcel secured his divorce.

It is thus all too obvious that the trial court should have instructed the jury that the conspiracy terminated on December 5, 1947, and that certain of the overt acts charged—Nos. 15 to 21 inclusive—did not constitute overt acts the doing of which would complete the crime of conspiracy, since post-December 5, 1947 acts could not be in furtherance of the conspiracy. But the trial court, adhering to the view of the indictment that the conspiracy continued up to the date of the indictment, did not so instruct the jury. Consequently the jury was told that certain acts could be found to be overt acts which, on this Court's ruling, *could not on any theory constitute overt acts intended to carry out the conspiracy or any part of it.* Cf. *Lonabaugh v. United States*, 179 Fed. 476, 479-81 (C. A. 8th, 1910).

Entirely apart from all other considerations, therefore, this Court's finding—correctly in our view—that the conspiracy terminated on December 5, 1947 renders improper, misleading, and erroneous as propositions of law the trial court's charge to the jury as to the scope, purpose, and duration of the conspiracy and its instruction with respect to what acts the jury might find to be the overt act or acts needed to complete the crime. The error thus revealed by this Court's ruling is compounded by the fact that the trial-court turned over the indictment to the jurors to take to the jury-room.

It is elementary that the trial court is under a duty to charge the jury fully and fairly. In stating the law applicable to the facts of the particular case, it must confine

itself to the issues raised by the pleadings and the facts developed at the trial, and it must state the law correctly. Yet while instructions should not go beyond the issues presented, they should cover all of them, and may not ignore any issues in the case which are supported by some evidence. 53 Am. Jur., Trial, §§ 573-81. Cf. *Bird v. United States*, 180 U. S. 356, 361. (1901); *Merchants Mutual Insurance Co. v. Baring*, 87 U. S. 159 (1874); *Screws v. United States*, 325 U. S. 91 (1945); *Morris v. United States*, 156 F. 2d 525 (C. A. 9th, 1946); *Samuel v. United States*, 169 F. 2d 787 (C. A. 9th, 1948).

Here, however, the jury was instructed that the conspiracy continued up to the date of the indictment. But the conspiracy terminated on December 5, 1947—over two-and-a-half years before the indictment. The jury was instructed that the indictment charged a conspiracy to conceal. The record is undisputed that there was no substantial evidence of any such conspiracy. The jury was instructed that it could find any one of the twenty-one overt acts charged in the indictment as an act in furtherance of the conspiracy and thus having the effect of completing the crime. Seven of the overt acts—since they took place after December 5, 1947—could not as a matter of law constitute overt acts in furtherance of the conspiracy.

Thus this Court, in correctly finding the termination date of the conspiracy, has revealed that, since the trial proceeded upon a quite different view, the jury was instructed erroneously and in such a manner as to make possible a finding of guilt on a theory of the offense which the December 5, 1947 ruling repudiates.

But this is not all, for this Court's view that the validity or invalidity of the marriages is immaterial renders utterly pointless the carefully drafted instructions given by the court as to the elements necessary to a valid marriage. Read in its entirety the court's charge to the jury put to the jury—as the principal issue—the question as to whether the three alleged ostensible marriages were valid or invalid. The detailed set of instructions on marriage could have no other purpose (R. 339-40), and both the government (R. 298, 299, 304, 306, 307) and the defendants (R. 340) proffered instructions on the subject.

Thus the jury was asked to pass upon an issue—in its view, understandably, the key issue—which the Court now says is not material. The anomaly is emphasized by the fact that, despite its lengthy charge, the trial court did not instruct the jury at all with respect to what would constitute “the willful concealment of a material fact” or under what circumstances the defendants would be duty-bound to reveal to the immigration and naturalization authorities the facts disclosing their marital intent.

Consequently, if it was not necessary to find that the marriages were invalid—that issue being immaterial—presumably the jury must have found that the defendants conspired to secure entry for the aliens by the willful concealment of material facts. Yet the instructions show that the jury was not instructed as to that issue or told the rules of law applicable to it in any fashion whatsoever, let alone with sufficient clarity to justify an appellate court's conclusion—on the record taken as a whole—that the jury did so find.

Finally, the view that the validity or invalidity of the marriages is immaterial renders altogether pointless In-

struction No. 22, which advised the jury that "The marriage of a man and a woman where one of the parties thereto has a husband or wife by a prior marriage who is then living and undivorced, is void" (R. 339, 354). Petitioners have contended all along that this instruction has no application to the case at all. Now, at long last, this Court's decision indicates conclusively that petitioners have been right. For, if there was no need for the jury to conclude that any marriage was void, and if in fact the whole discussion with respect to validity and invalidity is beside the point, then what possible purpose can an instruction such as Instruction No. 22 serve, but to confuse?

D.

Viewed in retrospect, then, in light of this Court's ruling that the conspiracy terminated on December 5, 1947, the trial court's instructions consist in large part of propositions which are either erroneous or utterly out of place. A jury treated to such a quantity of erroneous and irrelevant instruction could hardly be expected to reach a proper verdict, particularly when guidance as to other issues—considered by this Court to be of the greatest importance—was totally lacking from the trial court's charge.

It is a denial of due process to sustain convictions under a concept of the offense different from that which was submitted to the jury. It also amounts to a denial of a jury trial. *Cole v. Arkansas*, 333 U. S. 196 (1948); cf. *Virginian Ry. Co. v. Mullens*, 271 U. S. 220 (1926); *United States v. La Franca*, 282 U. S. 568 (1931).

IV.

THE APPLICATION OF THE OPINION OF THE COURT TO THE FACTS OF THIS CASE REQUIRES REVERSAL OF THE JUDGMENT BELOW AND A NEW TRIAL.

A.

Under the Principles Announced by the Court in This Case, Maria Knoll Was Incompetent to Testify Against Her Husband.

The opinion of the Court states that "Munio Knoll had been married in Poland in 1932 to one Maria Knoll. There is some evidence that Munio and Maria were divorced in 1942 but the existence and validity of this divorce are not determinable from the record" (Op., p. 2). Maria Knoll, called as the second witness on behalf of the government, was the first of the wives to testify. Objection was made to her competency as a witness on the ground that she was married to the defendant Munio Knoll in 1932, and a *voir dire* examination of the witness was requested (R. 41-42, 57).

The objections were overruled (R. 57). Maria was permitted to testify at length as to her marriage to Lutwak and to acts done by her long after the conspiracy terminated (R. 58-92). This evidence was admitted against all.

The opinion of this Court holds that the "ostensible" wives are competent to testify (Op., p. 10), but this Court has not passed on the question of Maria's competency. The record makes clear that she married Munio Knoll in Poland in 1932 and that the government never proved a divorce between them. Since that marriage obviously was not for "the purpose of using [it] in a scheme to defraud" (Op. p. 10), Maria was incompetent to testify against Munio so long as this Court recognizes the prohibition against anti-spousal testimony.

B.

The Record Does Not Support the Conclusion That Grace Knoll Was an "Ostensible" Wife, and Consequently It Was Error to Allow Her to Testify Over the Objection of Her Husband.

Grace Klemtner Knoll was the last of the wives to testify. Bess Osborne, who was the "ostensible" wife of Munio Knoll, had previously testified to a conversation in Paris between Leopold Knoll and Grace Klemtner Knoll at which the witness was present (R. 216). She testified that Leopold Knoll told Grace that "If you do not intend to marry me and stay married to me, and if you have only come over here to marry me for the purpose of getting me into the United States, and if it is for that purpose only, then you go back home, I do not want to marry you."

Grace Knoll testified that her marriage to Leopold was consummated before entry into the United States, that she and her husband had been living together as husband and wife after April 1, 1950, that they were not divorced, and that she intended to continue to live with her husband as his wife. The jury acquitted Grace's husband, Leopold Knoll.

By acquitting Leopold Knoll, the jury necessarily determined that he was not a member of the conspiracy alleged, and also to all intents and purposes that his marriage to Grace was not "ostensible."

In the light of this judicial determination and of the testimony showing the intentions of Leopold and Grace to remain married, the rule announced in the opinion of the Court with respect to "ostensible" wives is not applicable to this marriage. While the Court may have concluded that there was sufficient evidence of the lack of good faith in her marriage to permit Bess Osborne to

testify, the record and the jury's verdict do not permit the conclusion that Grace Knoll was a competent witness.

Hence, it was error to admit the testimony of Grace Knoll over the objection of her husband Leopold Knoll, as against both Leopold Knoll and the other defendants. The error was compounded by calling her as a court's witness, and by asking her questions which required her to plead the privilege against self-incrimination.

C.

The Admission Against the Defendants of Declarations Not in Furtherance of the Conspiracy Was Prejudicial Error.

The opinion of the Court asserts that only one declaration made after the conspiracy ended was admitted against all the alleged conspirators. The Court, however, holds that the error was harmless.

Yet another declaration, made prior to the termination of the conspiracy but not in furtherance of the common design, was also admitted against all of the defendants even though some of them were not present when the declaration was made. (The government contended in its Brief (p. 34 fn. 18) that this declaration was not in fact admitted against all of the conspirators, but government counsel, at the time of oral argument, conceded in conversation with petitioners' counsel that in fact this second declaration was so admitted against all.)

So that the record is perfectly clear, these are the facts concerning that declaration. The record shows (R. 155) that the witness Haberman was asked if he had a conversation with the defendants Munio Knoll and Marcel Lutwak about the defendant Leopold Knoll. He answered, "yes", and then the jury was asked to step out of the

room before the witness related the conversation. Haberman then said, out of the presence of the jury (R. 155):

By the Witness: Mr. Munio Knoll told me the reason he was in New York was because he was expecting his brother from Europe, and Mr. Marcel Lutwak said he probably will arrive the following day and will be able to stay in Chicago. Then Mr. Munio Knoll said to me, "Well, you see how easy it is if you know how to come to the United States."

Defense counsel objected that this conversation was not in furtherance of the conspiracy charged and was therefore not admissible against the other defendants (R. 155-60). Thereupon the court overruled the objection (R. 160), and in the presence of the jury, Haberman testified (R. 160):

Q. Will you relate the conversation?

A. Mr. Munio Knoll told me that the purpose for his stay in New York was because he was expecting the arrival of his brother Leopold, and Mr. Marcel Lutwak remarked that they had been expecting him for two days now, and he hadn't arrived, and if he did not arrive by tomorrow, which would be Wednesday, he would have to go back for business reasons to Chicago.

Q. Was there anything else said at that particular time about the matter?

A. No. The only thing that was said is that when Mr. Munio Knoll mentioned about his brother coming, he says, "*You see how easy it is to come to the United States if you know how.*"

This conversation was not properly admitted against the defendant Regina Treitler since the italicized portion was not in furtherance of the conspiracy.

Government Exhibit No. 19 is a certified copy of the divorce decree terminating the marriage of Maria and Marcel Lutwak. This decree was obtained long after the conspiracy ended. A certified copy of it was admitted

against all of the defendants over objection, although such a writing is hearsay.

Moreover, Government Exhibits Nos. 22, 23, 24 and 25 are photographs of Munio Knoll, Maria, and other people in night clubs many months after the termination of the alleged conspiracy. These photographs are evidence of a hearsay nature showing that Munio and Maria were together in night clubs, and hence some of them are not properly admissible against Marcel Lutwak, and none of them is competent against Regina Treitler. In any event, the probative value of the presence together of Maria and Munio Knoll in night clubs is remote, and the photographs were prejudicial in that they conveyed to the jury the idea that these refugees were rich night-club-goers celebrating their illegal entries.

Thus, there were admitted against Regina Treitler two damaging declarations, four photographs, and the divorce decree.

There was admitted against Marcel Lutwak one declaration and two photographs.

Against Munio Knoll there was admitted the divorce decree.

In considering whether the erroneous admission of these exhibits and testimony is reversible error, the government's case against each of the defendants must be considered separately. It is submitted that, in the case of all three, to deny that the admission of these declarations and hearsay evidence was prejudicial is to vitiate the harmless error rule.

In *Krulewitch v. United States*, 336 U.S. 440 (1949), a single declaration not in furtherance of the conspiracy charged was held to be improperly admitted against the defendant. That single declaration was not considered to be harmless error.

The government here charged one overall conspiracy involving three ostensible marriages to facilitate illegal entries into the United States. Yet there is absolutely no evidence that any other defendant had anything to do with Marcel Lutwak's trip to Paris during which he married Maria. It is perfectly consistent with all the facts in the record to contend that this marriage was in no way connected with the others.

While we do not here urge that to draw the inference of one conspiracy from the evidence in the record was error, the lack of evidence connecting the Marcel-Maria marriage with any overall scheme is significant in determining what is and what is not harmless error. Cf. *Kotteakos v. United States*, 328 U. S. 750 (1945).

Also of significance is the fact that the testimony of the wives apart, the most important evidence came from the witnesses Haberman and Ludmer, both of whom confessed animosity toward the defendant Munio Knoll. Ludmer's wife, for example, wrote a letter to Munio Knoll threatening to expose him if he did not pay her \$15,000 (R. 124-25), and although the letter was not permitted to be used to impeach Ludmer, Ludmer's hatred for the defendant Munio Knoll is clear from his testimony.

Finally, Bess Osborne, the ostensible wife without whose testimony a conviction could not have been obtained, and Maria Knoll, Munio Knoll's first wife, were accomplice witnesses. Accomplice testimony is unreliable under any circumstances, and is particularly dubious when it is remembered that these accomplices were not indicted, whereas Grace Knoll, another "ostensible" wife, who refused to cooperate with the government, was indicted.

These facts, in view of the entire record, should give rise to some hesitation before the conclusion is reached that the jury might not have been influenced by damaging declarations improperly admitted against all the defendants.

Conclusion.

This petition for rehearing has not been prepared as a routine gesture. Nor—and counsel so certify—is it intended for purposes of delay. Rather it is submitted by reason of petitioners'—and counsel's—passionate conviction that a grave injustice has been done—both to the persons involved in this case and to the principles and procedures which have made the Anglo-American legal system great.

An effort has therefore been made to express, as clearly and fully as possible, the implications of this Court's decision—not only with respect to this case itself but also with respect to the criminal law, and particularly the rules of evidence pertaining in trials of conspiracy.

With all due respect to this Court, we submit that the arguments advanced in this petition permit of only one result: *the convictions must be reversed*. And that result—we say to the Court—is a small price to pay for the preservation of rules of law basic to our finest traditions and our precious liberty.

Respectfully submitted,

ANTHONY BRADLEY EBEN,

RICHARD F. WATT,

BERNARD WEISSBOURD,

Counsel for Petitioners.

23 February 1943.

JOSEPH L. NELLIS,

DUNNING, NELLIS & LUNDIN,

Of Counsel.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

Counsel for Petitioners.

67-3908

APPLICATION FOR ADMISSION TO THE UNITED STATES

As a Nonquota Immigrant Under the Act of December 28, 1945

and for

ALIEN REGISTRATION

MANIFEST

Sheet No. 2

Line No. 8

No W 249970

I, the undersigned applicant for admission to the United States as a nonquota immigrant and for alien registration, being duly sworn, state the following facts regarding myself:

| | | | | | | |
|--|--------------------|------------------------|------------------------------|---------------------------|--|--|
| Name <u>ZYG MUNT ROMANKIEWICZ</u> | | | | | Age <u>40</u> | |
| Last permanent residence <u>79 GAMBETTA PLACE, PARIS FRANCE</u> | | | | | Occupation <u>DISTILLER</u> | |
| Date and place of birth <u>11/3/1907 KRNKOW POLAND</u> | | | | | <input checked="" type="checkbox"/> M <input type="checkbox"/> F <input type="checkbox"/> S <input type="checkbox"/> Name, sex, and age of accompanying children. United States citizen: | |
| Hair <u>BRN</u> | Eyes <u>BRN</u> | Height <u>5' 7"</u> | Nationality <u>POLAND</u> | Race <u>POLISH</u> | Alien (under 14): | |
| Marks of identification <u>NONE</u> | | | | Complexion <u>DARK</u> | | |
| Name and address of person to whom destined in United States <u>WIFE BESSIE BENJAMIN OSBORNE ROMANKIEWICZ</u> <u>35 S. CENTRAL PARK AVE. CHICAGO ILL</u> | | | | | | |

I claim to be a nonquota immigrant under the provisions of the act of December 28, 1945, and my claim is based on the following facts:

I was married to BESSIE B. OSBORNE on 11/3/47
at PARIS FRANCE
My {husband/wife} is a citizen of the United States,

Note

For lower portion of this

facts:

I was married to

BESSIE B. OSBORNE

on

11/3/47

at

PARIS FRANCE

My

{ husband
wife }

is a citizen of the United States,

and

{ is now serving in
was honorably discharged from }

the armed forces of the United States.

(The following facts regarding citizen spouse must be shown)

Serial No. in
armed forces of United States

20473 IK

Rank and branch of armed forces

1st CLASS STOREKEEPER
U.S.N. PERSONNEL SECT. GREAT LAKES, ILL

If honorably discharged,
date thereof

12/2/48

I have (not) been arrested or indicted for, or convicted of, any offense.

I intend to remain permanently in the United States.

I am able to read and write

POLISH

(Name of language)

I have had the following excludable classes explained to me, and I am not a member of any one of such classes: Paupers; professional beggars; vagrants; polygamists; anarchists; persons who believe in or advocate the overthrow by force or violence of the Government of the United States, or the assassination of public officials, or the unlawful destruction of property, or who have ever held or advocated such views; prostitutes; procurers; persons liable to become public charges; persons previously excluded or deported or ordered deported and permitted to leave the United States voluntarily under the order of deportation; aliens ineligible to citizenship; persons who have been deported from and at the expense of the United States under the provisions of section 23 of the act of February 5, 1917; persons who have been deported from the United States for any service.



WHEREFORE, I apply for admission to the United States, and for registration under the Alien Registration Act of 1940, of myself and my above-named accompanying alien children under 14 years of age.

X *Bessie B. Osborne*
(Signature of alien)

Subscribed and sworn to (or declared) before me on

NOV 13 1947

NEW YORK, N. Y.

F. J. MacFarlane

U.S. Immigration Inspector

(Signature and title of officer)

CONSOLIDATED

50.0R464

✓ FILED

FEB 27 1948

AT NEW YORK
RECEIVED
CLERK

PORT OF NEW YORK, N. Y.

I certify that the nonquota immigrant and accompanying alien children under 14 years of age, named herein, arrived in the United States at this port on the

S.S. 00-CBR.

on NOV 13 1947

and was inspected by me and duly { admitted under Sec. I, Act of December 25, 1945.
held for RSI

F. J. Hays
Immigrant Inspector.

ACTION BY RSI

ACTION ON APPEAL

0900K-16160
FEB 20 1948